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IN THE

# Supreme Court of the United States

ROBERT A. CLIFFORD,

*Petitioner,*

*v.*

DAVID N. MISSNER,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can state defamation law, consistent with the First and Fourteenth Amendments, force a lawyer to refrain from ethically permitted speech in zealously representing a client in order for the lawyer to avoid the threat of personal liability?

2. Are statements to the press, issued by a law firm and merely repeating the allegations in a client's complaint, protected expressions under the First and Fourteenth Amendments, as the public would reasonably understand that the statements are not facts that have already been established in court?

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## OPINIONS AND ORDERS BELOW

The trial court's opinion granting summary judgment in favor of Petitioner is reprinted in the Appendix. (36a) The Illinois Appellate Court's opinion reversing the entry of summary judgment and remanding the instant matter is reported at 914 N.E.2d 540 and is reprinted in the Appendix. (1a)

## JURISDICTIONAL STATEMENT

The Appellate Court issued an opinion on May 20, 2009. On June 10, 2009, Robert A. Clifford timely filed a petition for rehearing. On August 4, 2009, the court denied rehearing but withdrew the original opinion. On August 12, 2009, the Appellate Court issued a modified opinion. Subsequently, on August 25, 2009, the Illinois Supreme Court granted Clifford an extension of time for the filing a Petition for Leave to Appeal until September 29, 2009. That petition was timely filed. The Illinois Supreme Court denied the petition on November 25, 2009. This petition is timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The First Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution are reproduced in pertinent part in the Appendix at 166a.

## STATEMENT OF THE CASE

At stake in this litigation is the right of an Illinois attorney to make a public comment about a pending case in a manner that neither jeopardizes the integrity of the court system nor exceeds the First Amendment rights of any member of the press or the public. The threat of pecuniary liability that the decision below presents to all Illinois lawyers, and its impact on counsel's ability to vigorously advocate on behalf of their clients, warrant certiorari review by the Court. Allowing this decision to stand will encourage a new tactic of filing defamation suits against opposing attorneys who have made any comment to the media about a pending case, no matter how closely their comments hew to the public record. The satellite litigation this decision encourages disservices the clients and the courts, forcing the withdrawal from the client's case of the attorney who has been sued. In the face of no countervailing state interest to justify the constraint, the Illinois Appellate Court's decision dangerously restricts attorney speech beyond the authority of the First Amendment, and it therefore should be reversed.

### *Procedural History in the Circuit Court*

Long before Clifford or his office entered the picture, a contentious and complicated scene had already unfolded. Clifford's client, Michael Ficaro, is a Chicago attorney hired to represent a group of minority shareholders in a dispute with a majority shareholder. App. at 183a. After being retained by Ficaro, on

December 6, 2005 Clifford Law Offices filed a 67-page Amended Complaint, verified under oath by Ficaro, that contained allegations about events that occurred during the pendency of that shareholder litigation. App. at 174a-266a. The Amended Complaint alleged, *inter alia*, that Respondent, an attorney representing the majority shareholder in part of those proceedings, contacted a law partner of Ficaro and told the law partner that Respondent had received two affidavits that neither Ficaro nor his firm would want to be filed and made public. App. at 187a, 192a-193a. The Amended Complaint alleged that these affidavits were not relevant to the underlying litigation, and were being used to coerce Ficaro into resolving the lawsuit. App. at 193a-194a. The Amended Complaint further alleged that several defendants other than Respondent, who did not work directly with Respondent, had forged one of the affidavits. App. at 188a-190a.

Clifford did not sign the Amended Complaint. App. at 266a. Instead, his law partner, who was handling the litigation, signed the pleading after Ficaro verified it. *Id.* Clifford's name did appear on the signature page. *Id.* Soon after the Amended Complaint was filed, a Press Statement was issued, with a copy of the Amended Complaint attached, by another employee of the Clifford Law Offices. App. at 6a. The Press Statement read:

Statement of Robert A. Clifford in response to the filing of the Amended Complaint before Judge Donald Suriano in Ficaro v. Betzold, et al.

> As set forth in an Amended Complaint filed in the Cook County Circuit Court today (Tuesday, Dec. 6, 2005), Mike Ficaro has be :n defamed and greatly wronged as a result of intentional [sic] false and scurrilous statements made public by the defendants in an attempt to improperly influence the outcome of some vigorously contested corporate litigation involving tens of millions of dollars.
>
> The Amended Complaint alleges that one or more of the defendants forged the signature of an ex-FBI agent to a fictitious [sic] created false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.
>
> The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit. Mike Ficaro is a highly experience [sic] former prosecutor and civil litigator who has enjoyed in impeccable reputation both professionally and personally throughout his long career. We know that he will be vindicated in the court of law.

App. at 25a-26a.

Nearly a year later, on December 4, 2006, Respondent filed a one-count complaint against Robert A. Clifford alleging defamation *per se* based on the Press Statement. App. at 76a. During the course of the Ficaro proceedings, the ex-FBI agent testified at a deposition that he signed the affidavit, but he also admitted to telling Ficaro's partner that he did not at first recall signing the document. App. at 71a. Two months after the deposition, Ficaro filed a verified Second Amended Complaint that omitted the claim that the agent's deposition was forged. App. at 72a.

Meanwhile, several defendants in the Ficaro litigation moved for sanctions against Clifford Law Offices and a partner of the firm, Richard Burke, under Illinois Supreme Court Rule 137. App. at 63a, 67a. The trial court found, and the Appellate Court affirmed, that Ficaro had reason to believe that the subject affidavit was a forgery at least up until the time of the author's deposition. App. at 61a, 73a. The trial court specifically found that the agent had "repudiated his signature on the June 2004 affidavit to [Ficaro's partner], and, later, in deposition testimony, recanted." App. at 69a-70a, 72a. That court also noted that Ficaro did not continue to prosecute the forgery claim and timely abandoned it. App. at 72a. There was no judicial determination on the forgery question. App. at 73a.

After the instant litigation was filed naming him as a defendant, Clifford and his office withdrew as counsel for Ficaro. App. at 131a-135a.

The trial court granted Clifford summary judgment, finding that the December 6, 2005, statement "is privileged under the fair report doctrine." App. at 102a.

***The Appellate Court's Opinion***

The Appellate Court reversed the summary judgment. App. at 24a. Leaving undisturbed the trial court's finding that the Press Statement was a fair abridgment of the allegations in the Amended Complaint, something Missner never challenged on appeal, the panel focused on what it considered to be the central issue: whether Clifford, as a matter of law, "was entitled to assert the fair report privilege and was not precluded from doing so by the self-conferral exception." App. at 16a. The Appellate Court confirmed that fair report protection applies equally to media and nonmedia reporters, according to Restatement (Second) of Torts § 611, as long as the report is fair and accurate. App. at 17a. The court went a step further, however, and found that a so-called "self-conferral" exception may apply. App. at 18a. The court relied on comment c of the Restatement, interpreting it to mean that "under the common law rule, '[a] person cannot confer [the fair report] privilege upon himself by making the original defamatory statement himself and then reporting to other people what he has stated' under the guise of privilege, even if the original publication itself was privileged." *Id.*

The panel further held that, although the Illinois Supreme Court had not addressed this issue, it had

adopted § 611 in the case of *Solaia Technology v. Specialty Publishing Co.*, 221 Ill. 2d 558 (2006). App. at 19a. The panel therefore felt itself bound to apply comment c in its entirety. *Id.* The Appellate Court equated a person "making the original defamatory statement" with one who "publishes" such a statement and looked to defamation law to determine whether Clifford was an actual "publisher" of the defamatory statement. App. at 23a. That court then found that the evidence was "sufficient to pose a question of fact as to whether Clifford participated in the publication of the original defamatory statements . . . ." App. at 24a. The court remanded the cause of action to the trial court to determine the factual issue of whether Clifford could be considered a "publisher." App. at 24a.

## REASONS FOR GRANTING THE PETITION

### I. CAN STATE DEFAMATION LAW, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS, FORCE A LAWYER TO CHOOSE BETWEEN ETHICALLY PERMITTED SPEECH TO ZEALOUSLY REPRESENT A CLIENT, AND SILENCE TO AVOID PERSONAL LIABILITY?

The First Amendment and Fourteenth Amendments "command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox Broad. Co. v. Cohn*, 420 U.S. 469, 495 (1975). Ignoring this command, an Illinois Appellate Court held that attorney Robert Clifford may be liable for his law firm's truthful report of information contained in an official court record that the law firm filed in good faith. State fair report privilege law and the First Amendment would immunize an identical report by a journalist, even if made maliciously. The Appellate Court held, however, that although the law firm zealously represented its client completely within the bounds of the ethical rules, Clifford may have committed an actionable defamation. The Appellate Court's decision thus leaves all Illinois counsel to face the untenable choice between speaking out in the client's best interest and staying silent to avoid personal liability for the lawyer. This Court's intervention is warranted now, before any other lawyers and clients must face the decision made inevitable by the Appellate Court's erroneous holding.

The Illinois Appellate Court misapplied a provision of the Restatement (Second) of Torts (the "Restatement") to limit lawyer speech in derogation of this Court's decisions under the First and Fourteenth Amendments. Unconstitutionally construing comment c to Restatement § 611, the Appellate Court held that a lawyer could be held liable for defamation if he is found to have "participated in the publication" of a court filing, even where that court filing is protected by absolute privilege. This application of the definition of the word "*publish*" in defamation law is at odds with the plain language of the Restatement comment, which provides that "a person cannot confer the privilege upon himself by *making* the original defamatory publication himself and then reporting to other people what he had stated." RESTATEMENT (SECOND) OF TORTS § 611 cmt. c (emphasis added). App. at 167a. By holding that the attorney "mak[es]" a statement when he "publishes" the document in the court's record, the Illinois Appellate Court unconstitutionally conflates two distinct concepts and, as a consequence, restricts lawyers' speech more narrowly than permitted under the decisions of this Court.

Indeed, if there is any merit at all to the argument that an attorney "publishes" a complaint by affixing his name to a signature block and filing it in court, there is no support for finding that an attorney "makes" the allegations in the client's complaint. In reaching this holding, the Appellate Court has blurred the lines between party and advocate, lines this Court and others have sharply drawn in other contexts. The Appellate

Court has also contravened this Court's recognition that zealous advocacy may at times require counsel to speak up outside of the absolutely privileged context of the courtroom.

The threat of litigation now looms large for counsel who offer even the most basic statements to the press regarding a pending case. This threat severely chills zealous advocacy and constrains lawyers' First Amendment rights further than those of other citizens. Very clearly, the decision of the Appellate Court imposes on counsel "the threat or actual imposition of pecuniary liability from alleged defamation" that "may impair the unfettered exercise of these First Amendment freedoms[.]" *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12 (1970). Review at this time therefore is warranted.

### A. *Attorneys' extrajudicial speech plays a vital role in keeping the public informed.*

A prominent Chicago attorney has been singled out, left vulnerable to a defamation claim without the legal protections that would otherwise shield him but for one fact—he is an attorney in the case that was the subject of his speech. Speech by an attorney alleging wrongdoing on behalf of a client must be protected for two fundamental reasons. First, the zealous representation demanded of the members of the bar may at times require advocacy outside of the courtroom. Second, attorneys are frequently in the best position to shed light on the workings of the court system and the events that transpire in a particular courtroom. This is precisely why, in circumstances such as the one at bar,

this Court has accorded "speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995).

As this Court has made clear, attorneys do not abandon their First Amendment rights when admitted to the bar. To the contrary, this Court recognizes that in exercising their First Amendment rights, attorneys often serve the interests of their clients when they publicly discuss their work. As the Court has noted, at times "press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991). First Amendment principles therefore must be applied "in the case of speech by an attorney regarding pending cases." *Id.* at 1054.

Attorneys' comments about litigation not only benefit the client, they also inform the public at large. Attorneys are uniquely qualified to provide the public with information about proceedings and documents historically open to the public. This Court has long held that courtroom proceedings are open to public review and scrutiny. "What transpires in the court room is public property. . . . There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374 (1954); *see also Cox v. Cohn*, 420 U.S. 469, 492 (1975)

> "Without the information provided by the press most of us and many of our

> representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

*Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) ("[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom."). The public's right of access to the courts, which is rooted in the First Amendment, extends to court documents as well as the proceedings themselves. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-10 (1984); *see also Nixon v. Warner Comm'ns*, 435 U.S. 589, 597, 609 (1978). This right extends to civil as well as criminal cases. *Smith v. United States Dist. Court*, 956 F.2d 647, 650 (7th Cir. 1992).

Attorneys' intimate familiarity with the facts of their clients' cases and filings often makes them the best sources to explain litigation to the press and public, who cannot possibly attend all proceedings of public interest. As the Court knows, attorneys therefore can serve as excellent facilitators of the free flow of information on public proceedings. *See Gentile*, 501 U.S. at 1056 ("[T]he press and public rely upon attorneys for information because attorneys are well informed, this may prove the value to the public of speech by members of the bar.").

Attorneys also have specialized knowledge of the court system, as well as the ability to communicate that

knowledge to the general public. Chilling attorney speech will have a profound effect on the media's ability to collect information about pending cases and will therefore hamper the public's appreciation for the vital role of the court system in our democracy.

> "If the dangers of their speech arise from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood the speech will be believed, these are not the sort of dangers that can validate restrictions. The First Amendment does not permit suppression of speech because of its power to command assent."

*Id.* at 1057; *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 473-74 (1988) ("[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient.").

### B. *There is no constitutional justification for restricting ethically permissible speech*

This Court has yet to consider restrictions placed on an attorney's extrajudicial commentary where the comments were firmly within the boundaries prescribed by a state's ethical rules. In general, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). Where "truthful information about a matter of public significance [is lawfully obtained] then state officials may not

constitutionally punish publication of the information, absent a need . . . of the highest order." *Id.* at 528 (internal citations omitted). No such need exists here.

Clearly, the courts and the states' bar associations can restrict attorney speech regarding pending litigation in manners that cannot be lawfully applied to other citizens. Those restrictions, however, must be extremely narrow in scope and clearly justified by a sufficiently significant need. To date, the cases reviewed by this Court have primarily concerned: (1) the effect of pretrial publicity on the fairness of the proceedings: *Gentile*, 501 U.S. at 1075 (permitting "only narrow and necessary limitations on lawyers' speech" in order to balance "the First Amendment rights of attorneys in pending cases and the State's interest in fair trials"); *see also Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 15 (1986) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (balancing First and Sixth Amendment considerations in determining whether press reports of high profile trial can be restrained); *Sheppard v. Maxwell*, 384 U.S. 333, 361-63 (1966)

> "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

or (2) ethical constraints on attorney advertising, guided by principles of truth and decorum. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (ruling that the flow of information in a truthful advertisement concerning the availability and terms of routine legal services may not be restrained without violating the First Amendment); *see also Went For It, Inc.*, 515 U.S. at 624; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (finding that "blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible").

In each of these circumstances, the Court has endeavored to preserve maximum breathing room for the speech. In the fair trial/free press context, the Court requires the demonstration of a clear threat to the administration of justice and a narrowly tailored restriction on speech that will ameliorate that threat. In the cases concerning a direct restraint on attorney speech, the Court has sanctioned only those restrictions narrowly necessary to prevent deceptive advertisements, in-person solicitations that may pressure a potential client into an immediate decision of whether to retain an attorney, or solicitations constituting intrusions on the privacy of the recipients. *See Zauderer*, 471 U.S. at 642-44; *see also Went For It, Inc.*, 515 U.S. at 624 (finding that direct mail solicitations specifically targeting victims in the immediate aftermath of accidents could be regulated by state bar); *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 512 U.S. 136, 143 (1994) ("Mere speculation or conjecture will not suffice; rather the State must demonstrate that

the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (internal quotations and citation omitted); *In re R.M.J.*, 455 U.S. 191, 206-07 (1982) ("[A]lthough the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests."). Indeed, in disapproving a state bar's punishment of an attorney who spoke outside of the courtroom, the Court in *Gentile* recognized that "First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to he practice of law." *Gentile*, 501 U.S. at 1054.

Here, the Respondent did not allege, and the Illinois Appellate Court did not find, that the Press Statement in any way impinged on the fairness of the underlying litigation. Indeed, simply notifying the press that a complaint has been filed could hardly bias a potential jury. Moreover, the Press Statement's repetition of the allegations of the complaint could hardly have threatened the privacy of the recipients. In fact, in the lawsuit brought by Clifford's law firm on behalf of its client, the trial court found, and an Appellate Court affirmed, that Clifford's client "presented an objectively reasonable argument for including [the allegedly defamatory] allegation, and therefore the fact that this allegation was later found to be untrue and that plaintiff's investigation was not exhaustive would not warrant sanctions." The courts ruled that Illinois Supreme Court Rule 137, the state's equivalent of Federal Rule of Civil Procedure 11, had not been violated.

As the underlying complaint did not violate ethical rules, no one has alleged and no court has found that the Press Statement constituted a threat to the fairness of the proceedings, and the law firm's speech was not commercial speech, the First Amendment does not permit the award of civil damages against an attorney in the case. The Appellate Court's opinion has created a scenario where a pleading verified by one person in good faith cannot be punished in that lawsuit, but may still form the basis of an action against an attorney whose name appears in the signature block in another. This Court's review clearly is warranted to restore the First Amendment boundaries are restored when lawyers speak publicly about their clients' matters.

### C. *The Illinois Appellate Court's decision is in stark contrast to the states who have recognized the value of protecting attorney speech*

Recognizing the important First Amendment precepts we urge here, states other than Illinois afford attorneys the same qualified privilege as other citizens to fairly report on public proceedings appears to be unique to Illinois. While most states have rejected an *absolute* privilege for attorneys to speak to the press about pending litigation, all states to consider the issue have applied at least a *qualified* privilege to an attorney's out-of-court statements. The application of a qualified privilege—one that cannot be defeated where the underlying allegations were made in good faith in a court—would adequately protect the First Amendment interests of counsel, client, and the public, while leaving the states free to adopt broader, absolute privileges under their common laws of defamation.

New York, for example, has codified the privilege under its Civil Rights Law § 74, and under the case law has held that an attorney is protected by a qualified privilege for "publication of a fair and true report of any judicial proceeding." *Lacher v. Engel*, 33 A.3d 10, 17 (N.Y.S.2d 2006) (ordering dismissal of complaint against attorney who fairly summarized the allegations in an underlying complaint in comments to the media). The California legislature followed New York's lead, overturning *Shahvar v. Superior Court of Santa Clara County*, 25 Cal. App. 4th 653 (1994), a case that rejected a party's reliance on the fair report privilege to protect himself against a claim that he directed his attorney to send a copy of a complaint to the media. CALIF. CIV. CODE § 47(d)(1)(E) (2009) (providing privilege for fair report by or to the media of a verified charge or complaint made by any person). In adopting the new law, the legislature made clear its intent "to preserve the scarce resources of California's courts, to avoid using the courts for satellite litigation, and to increase public participation in the political, legislative and judicial processes." *Id.*; S. 1540, 1996 Leg., Reg. Sess. (Ca. 1996). Even the court in *Shahvar* questioned the prudence of allowing litigation to proceed where the damages sought arguably flow from the media's decision to publish the allegations contained in a complaint, not from the attorney's decision to send that complaint to the media. *Shahvar*, 25 Cal. App. 4th at 663 n.3.

Both Pennsylvania and New Jersey have long found that a qualified privilege exists allowing attorneys to speak to the media about a pending case. *E.g. Barto v. Felix*, 378 A.2d 927, 930 (Pa. Super. Ct. 1977); *Capello v. Scott*, 644 A.2d 102, 103 (N.J. Super. Ct. App. Div. 1994)

(citing cases). A Florida appellate court also recognized that "there is a qualified privilege to make reports of judicial and quasi-judicial proceedings as long as they are accurate, fair and impartial. This privilege extends to protect the remarks of counsel as well." *Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. Dist. Ct. App. 1985).

Other courts have specifically rejected the reasoning of the Illinois Appellate Court, finding that no so-called "self-conferral" exception to the fair report privilege exists, or that its application should be severely restricted to cases in which a public record has been created in bad faith *solely* to avoid defamation claim. *See, e.g., Rosenberg v. Helinski*, 616 A.2d 866, 876-77 (Md. 1992) (citing cases). The Maryland Court of Appeals in *Rosenberg* case found that denying "the privilege to a witness reporting his own testimony, while the privilege is available to any other court spectator later recounting that same testimony, would defy logic." *Id.* at 877. In the Sixth Circuit, which rejected a self-conferral exception under Michigan law, a concurrence also noted the absurdity of the doctrine announced in this case: "[S]uppose the plaintiff, or perhaps her lawyer, is interviewed on a news program and responds with a fair and true summary of the complaint's allegations. Surely it makes no sense to interpret the statute so as to extend the privilege to the interviewer but not to the interviewee." *Amway Corp. v. Proctor & Gamble Co.*, 346 F.3d 180, 190 (6th Cir. 2003) (Schwarzer, J., concurring). A New Mexico appellate court found that the exception, if it existed, did not apply to the facts before it. *Stover v. Journal Pub. Co.*, 731 P.2d 1335, 1339-40 (N.M. Ct. App. 1987). That court noted the strange result of according an attorney absolute immunity for

making defamatory remarks in a pleading and yet potentially conferring liability on the fair and accurate report of the same material. *Id.* at 1340.

In each of these cases, the courts understandably found it problematic to confer a privilege on someone who holds a public meeting "not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience." *Id.* at 1339; *see also Green Acres Trust v. London*, 688 P.2d 617, 626 (Ariz. 1984) (Arizona Supreme Court states, in *dicta*, "One exception to this wide application is the speaker who *by design* uses the privilege to republish defamation he previously made during the public proceeding.") (emphasis added); *Rosenberg*, 616 A.2d at 685 ("We think this to be the better interpretation of the Restatement; the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place.").

If this Court were to restrict the state courts' ability to curtail the fair report privilege, by holding that the First Amendment protects lawyers who speak about their cases in good faith, it would prevent undue encroachment upon free speech and zealous advocacy while permitting aggrieved plaintiffs redress for outlier attacks. Such a rule would also provide counsel, clients and the public in Illinois with the same First Amendment protections as all other jurisdictions that have considered the issue. Illinois lawyers alone should not be left to face the chilling specter of litigation for every extrajudicial

comment made about a pending case, particularly where, as in this case, there is no basis to find that the litigation was initiated for the sole purpose to create an immunized forum for the parties and their counsel. This Court's review is warranted to ameliorate the First Amendment chill solely surrounding litigation in Illinois.

### D. *Attorneys should not be denied rights accorded to others*

One of the most telling facts of this litigation appears on the face of the complaint itself—no media outlet has been named as a party. There is no contention, for example, that the *Chicago Tribune* unfairly reported the allegations of the complaint. Indeed, the trial court found that the contents of the Press Statement were a fair abridgment of the allegations contained in the complaint, and this finding was neither challenged nor reversed on review. Thus, if Clifford had been a journalist reporting the same information contained in the Press Statement, no liability would attach. Solely by reason of his status as an attorney related to the case has Clifford been dragged through this litigation. This is in direct contravention of established precedent.

This Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Citizens United v. Fed. Election Comm'n*, __ S.Ct. __, 2010 WL 183856 at * 36 (Jan. 21, 2010) (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)); *see also id.* at *52 ("The Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any

category of speaker, from single individuals to partnerships of individuals . . . .") (Scalia, J., concurring); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) ("[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."); *First Nat'l Bank of Boston v. Bellotti*, 435 US 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Pacific Gas v. Public Utils. Comm'n*, 475 US 1, 8. (1986) (plurality) ("The identity of the speaker is not decisive in determining whether speech is protected.").

Singling Clifford out by virtue of his status as an attorney related to the case is patently unfair and an unjust encroachment on the First Amendment. *See Citizens United*, 2010 WL 183856 at *19

> "The Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."

This ruling makes it impossible for any attorney to discuss a pending case in which he is involved outside of the courtroom without fear of retribution.

In addition to no support in precedent, no practical case can be made for such a restriction. Any potential harm flowing from comments directly based on a court record would be no greater than the harm from the court record itself. And once the concession has been made that the media would have the right to make the same report, it is nonsensical to contend that an attorney connected to the case should not have the very same right. As a Texas Court of Appeals found, "[t]he harm resulting to a defamed party from delivery of pleadings in a lawsuit to the news media could demonstratively be no greater than if the news media found the pleadings on their own." *Dallas Indep. School Dist. v. Finlan*, 27 S.W.2d 220, 239 (Tex. App. 2000).

### E. *This issue must be resolved at this stage to avoid an uneasy and unsettled constitutional posture in Illinois*

It is imperative that the Court address this matter now, prior to further proceedings in the Illinois Circuit Court, to prevent this unconstitutional decision from chilling attorney speech throughout Illinois and beyond. Forcing defendants like Clifford to undergo trial, in the wake of an erroneous rendition of free speech law, will serve only to waste sparse judicial resources and further chill expression in this and all other Illinois litigation. Just as in *Cox v. Cohn*, a decision by this Court in favor of Clifford would preclude the need for trial or the determination of any factual issues. *Cox*, 420 U.S. at 485. In fact, even were Clifford to ultimately prevail at trial, the unreviewed decision of the Illinois Appellate Court would remain in effect. *See id.* Delaying the final decision of Clifford's First Amendment claim will leave

unanswered an important First Amendment question, creating an "uneasy and unsettled constitutional posture" that will chill the speech of attorneys in Illinois. *See id.* at 486.

Moreover, other practical, procedural reasons warrant immediate review. As this case demonstrates, when a disgruntled litigant is permitted to file suit against an attorney representing the opposition, for simply reporting on allegations from a public court record, the attorney is left standing in an ethical landmine. With each step counsel takes to vigorously represent his client, he must consider the impact on his own personal liability, and whether acting in his own best interest, may set off unfavorable outcomes for his client. Adequate representation of the client cannot tolerate this sort of paralytic tension, which leaves the attorney—as Clifford was forced to do in his client's case—with no choice but to withdraw. It also invites gamesmanship through the filing of satellite defamation claims as a strategy in the principal litigation.

Furthermore, litigation against those who chose to speak on behalf of their clients in the face of potential personal liability will present procedural nightmares. Because the core of objective facts of the underlying case will necessarily be bound together with those of the defamation claim—particularly where, as here, the allegedly defamatory language is nothing more than a paraphrase of the allegations in the complaint—the risk of conflicting findings of fact and law will abound. Both the court in the underlying case and the court in the defamation case will need to assess whether the facts asserted in the complaint are true. A court faced with

this prospect will need to choose between staying the defamation claim, or simply proceeding along with the potential of creating inconsistent results.

### F. *Clifford's First Amendment claims have been preserved*

In previous filings to the Illinois Supreme Court, Respondent offered little substantive rebuttal to Clifford's arguments, instead resting on the faulty contention that Clifford has not properly preserved his First Amendment arguments. Respondent overlooks the fact that a reviewing court has the obligation to "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal citations omitted). Moreover, the record confirms that Clifford properly preserved the First Amendment issues raised here.

Throughout this litigation, Clifford has consistently maintained that the Press Statement is constitutionally protected opinion under the First Amendment. App. at 127a, 161a-164a. Clifford therefore, contrary to the Respondent's assertions below, has preserved the First Amendment issues for this Court's review. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citing the traditional rule that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"). Whether or not the Appellate Court passed on the issue of the constitutional protection of an attorney's opinions is of

no consequence. *Id.* ("Our practice permits review of an issue not pressed so long as it has been passed upon.") (internal citations omitted).

Moreover, the Appellate Court's denial of protection under the Restatement comment c crystallizes the First Amendment issues as outlined in this Petition. While a First Amendment analysis may not have been an explicit factor in the Appellate Court's reasoning, the sources that court relied upon were squarely decided on First Amendment grounds. For example, the Appellate Court relied on *Solaia Technology* to find that Respondent established a *prima facie* case of defamation, to hold that a privilege may apply, and to define the fair report privilege. App. at 19a-20a. Noting that while the Illinois Supreme Court has never "squarely addressed the threshold issue," the Appellate Court also relied on *Solaia* to suggest that Illinois had adopted the "self-conferral" exception. App. at 19a.

*Solaia*, in turn, establishes the link between the First Amendment and the fair report privilege. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 211 Ill. 2d 558, 585 (2006) ("The fair report privilege is a qualified privilege which promotes our system of self-governance by servicing the public's interest in official proceedings, including judicial proceedings.") (citing *Cox*, 420 U.S. at 491-92). In holding that actual malice does not defeat the fair report privilege, the *Solaia* court found that "the first amendment itself prevents actual malice from defeating the privilege." *Id.* at 587. Perhaps most importantly for the case at bar, the *Solaia* court approved of comment b of the Restatement, which states that "If the report of a public official proceeding is

accurate or a fair abridgment, *an action cannot be constitutionally maintained.*" *Id.* at 588 (emphasis added).

Thus, First Amendment concerns have permeated this litigation since its inception, and flowed through to the Appellate Court decision, which places Clifford's rights under the First Amendment in serious jeopardy. The issues raised in this petition have been preserved.

## II. ARE STATEMENTS TO THE PRESS, ISSUED BY A LAW FIRM AND MERELY REPEATING THE ALLEGATIONS IN A CLIENT'S COMPLAINT, PROTECTED EXPRESSIONS UNDER THE FIRST AND FOURTEENTH AMENDMENTS, AS THE PUBLIC WOULD REASONABLY UNDERSTAND THAT THE STATEMENTS ARE NOT FACTS THAT HAVE ALREADY BEEN ESTABLISHED IN COURT?

In addition to the unconstitutional constraints on lawyer speech in the public interest, the Illinois Appellate Court decision contravenes the First Amendment as the speech in the Press Statement, read in its proper context, is not actionable under the doctrine of *Milkovich v. Lorain Journal Co.* The Press Statement clearly repeats the unproven allegations of a litigant and therefore is not a statement of fact. In construing the Press Statement as entirely factual, and not opinion, the Illinois Appellate Court gave no credence to its context. The Press Statement couched all of the language the Appellate Court found to be defamatory as statements that were "set forth in an Amended Complaint," or alleged in the complaint. The

Press Statement was issued under a heading that clearly attributed it to an attorney representing a client involved in a pending litigation. Nowhere does the Appellate Court discuss this undisputed context. Under the holdings of this Court and the Illinois Supreme Court, this context renders the Press Statement not actionable.

As Justice Holmes once observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Indeed, this Court has long recognized that the determination of whether language can be construed as defamatory is not made in a vacuum—the dispositive question is whether a reasonable reader would infer a defamatory meaning within the context of the entire publication. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

For example, in *Greenbelt Publishing Association v. Bresler*, this Court found that the reasonable reader would not read a story reporting that some people had characterized a local real estate developer's negotiation tactics as "blackmail" to mean that the developer had engaged in criminal behavior. 398 U.S. at 14. On the contrary, the Court recognized that the reader would take into account the context in which the term "blackmail" appeared—in a story about public debates in a city council hearing on a proposal to build a high school on land partially owned by the developer. *Id.* The Court found it beyond question that no reasonable reader would fail to appreciate that "it was [the developer's] public and wholly legal negotiating

proposals that were being criticized." *Id.* Following this reasoning, the Court in *National Association of Letter Carriers v. Austin* found it was impossible to believe that any reader of a union newsletter would interpret the use of the word "scab" to mean that the plaintiff in that case was a traitor, despite the juxtaposition of a piece of literature describing a union scab as "a traitor to his God, his country, his family and his class." 418 U.S. 264, 267, 284 (1974). In *Bates v. State Bar of Arizona*, this Court found that an attorney's advertisement was protected under the First Amendment in part because the public would understand the intended meaning of the term "legal clinic," and would not be misled. 433 U.S. at 381 (1977).

In the case at bar, no reasonable reader of the Press Statement would believe that attorney Clifford was making factual accusations. When the context is an attorney's comments about a pending case, Illinois has found that an attorney's extrajudicial commentary can be reasonably viewed as an expression of the attorney's opinions regarding his client's allegations. *Owen v. Carr*, 113 Ill. 2d 273, 280 (1986). Moreover, the Illinois Supreme Court has recently recognized that the public appreciates the context of litigation and the lawyers' role in it: "[T]he public has a sophisticated understanding of the court system and is capable of evaluating information gleaned from a complaint." *Solaia Tech.*, 221 Ill. 2d at 589 (rejecting a "judicial action" limitation on the fair report privilege). This Court has similarly recognized that the public is sophisticated enough to understand the limitations of attorney advertisements. *Bates*, 433 U.S. at 374-75; *see also Peel v. Attorney Registration & Disciplinary*

*Comm'n of Illinois*, 496 U.S. 91, 105 (1990) (rejecting the "paternalistic assumption" that recipients of an attorney's letterhead "are no more discriminating than the audience for children's television").

When this "sophisticated understanding" is applied to an attorney's comments, the reasonable reader is fully capable of discerning from context that an attorney is merely expressing his contentions on behalf of his client. *See Seidl v. Greentree Mortgage Co.*, 30 F. Supp. 2d 1292, 1316-17 (D. Colo. 1998) (finding that republished demand letter contained protected opinion because "a person reading it would understand it is a demand letter from an attorney on behalf of a client and represents the attorney's contentions on behalf of the client"); *see also Brian v. Richardson*, 660 N.E.2d 1126, 1131 (N.Y. 1995) (finding that author's disclosure that he was an attorney involved in the matter about which he was writing signaled "that he was not a disinterested observer").

In the context of the case at bar, certainly the media outlets that received the Press Statement could understand the comments in the Press Statement to be no more than an attorney's contentions on behalf of his client. The only comments taken directly from the Press Statement were attributed to Clifford and could only reasonably be read as the statements of an attorney speaking on behalf of his client about a matter of public record. The Illinois Appellate Court, focusing only on the words used in the Press Statement, gave no weight to the context of an attorney repeating allegations in a complaint newly filed on behalf of a client. As the court

below disregarded the contextual analysis prescribed by this Court, review is warranted before any further proceedings below.

## CONCLUSION

This Court has recognized a First Amendment right, and at certain times an ethical imperative, for counsel to speak outside of the courtroom on behalf of their clients. The Illinois Appellate Court, however, has contravened these decisions by placing all Illinois lawyers in peril of civil damages if they make even the most basic comment about their clients' cases. The law in Illinois as it now stands leaves lawyers like Clifford with no choice but to forego their constitutional protections and subordinate their ethical duties by remaining silent. Worse yet, the appellate decision forces counsel to withdraw from the representation when their comments become subject to targeted collateral litigation. Especially where, as here, the statement attributed to counsel is based on a lawsuit found to have been filed in good faith, no valid interest can justify the chill on an attorney's speech that this decision certainly will bring. As the Appellate Court's decision flies in the face of this Court's precedent, the Constitution, and the duties required for zealous advocacy, the review of the Court, at this stage of the proceedings, is essential.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION DATED AUGUST 12, 2009

## APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

August 12, 2009

1-08-0686

DAVID N. MISSNER,

Plaintiff-Appellant,

v.

ROBERT A. CLIFFORD,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

No. 06 L 12632

The Honorable Jennifer Duncan-Brice,
Judge Presiding.

**MODIFIED UPON REHEARING**

JUSTICE THEIS delivered the opinion of the Court:

In this defamation action, plaintiff David N. Missner appeals from an order in which the circuit court converted defendant Robert A. Clifford's motion to

dismiss under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2006)) into a motion for summary judgment under section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2006)), and subsequently granted summary judgment in favor of Clifford. On appeal, Missner argues that the circuit court erred in: (1) converting Clifford's motion to dismiss to a motion for summary judgment; and (2) granting summary judgment for Clifford on the grounds that his publication of defamatory material was protected by the fair report privilege. For the following reasons, we reverse and remand for further proceedings.

In his complaint[1], Missner, an attorney, alleged that he was retained by Nicholas Betzold, Jr. to represent him personally in a chapter 11 bankruptcy proceeding (11 U.S.C. §1101 *et seq.* (2000)). In re Betzold, 316 B.R. 906 (Bankr. N.D. Ill. 2004). At the same time, Betzold was involved in a separate arbitration proceeding against three minority shareholders of the financial services companies that he controlled. Missner did not represent Betzold or the companies in the arbitration

Soon after initiating the bankruptcy proceeding, Missner filed a motion in that case to stay the pending arbitration because the arbitrator had an undisclosed relationship and "common association" with attorney Michael Ficaro, who represented the shareholders in

1. Missner's law partner, William Choslovsky, also was a plaintiff in the original complaint. However, Choslovsky later voluntarily dismissed the complaint as to himself and refiled a separate complaint.

the arbitration In support of his motion, Missner attached the affidavit of a former Federal Bureau of Investigation (FBI) agent named Francis Marrocco, which Betzold's arbitration attorneys obtained while attempting to substitute the arbitrator in that proceeding. Missner asserted that the arbitration attorneys gave him the Marrocco affidavit before he filed the bankruptcy proceeding; he did not participate in procuring the affidavit.

Approximately one year after Missner filed the bankruptcy proceeding and the motion to stay, Ficaro filed a complaint for defamation against Missner and others arising out of the filing of the Marrocco affidavit in the bankruptcy proceeding. Ficaro v. Betzold, No. 05-L-8474 (Cir. Ct. Cook Co.).[2] Clifford represented Ficaro in that defamation suit through his law firm, Clifford Law Offices. Clifford was listed as "Attorney for Plaintiff" on the original and first amended Ficaro complaints, along with attorneys Richard Burke and Shannon McNulty.

Missner alleged that shortly after filing the first amended complaint in the Ficaro defamation case (Ficaro complaint), Clifford issued a defamatory press statement to the Chicago Tribune and the Chicago Daily Law Bulletin, which accused Missner of the following acts in the course of the bankruptcy proceeding:

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2. The case is currently on appeal in another division of this court (appeal Nos. 1-07-1469 and 1-07-3433 (consolidated)).

*Appendix A*

"(a) 'forg[ing] the signature of an ex-FBI agent to a fictitious, created, false and untrue affidavit. . .'

(b) ma[king] 'intentional false and scurrilous statements . . . in an attempt to improperly influence the outcome of some vigorously contested corporate litigation. . .'

(c) concoct[ing] the Marrocco [the ex-FBI agent] affidavit 'to try to pressure Ficaro to settle a lawsuit in which his clients were seeking $ 15 million from the businessman, Nicholas Betzold.'

(d) 'intend[ing] to extort Ficaro and his law firm into settling' the lawsuit by using the Marrocco affidavit."

Missner alleged that the press statement constituted defamation *per se* because it conveyed that he lacked integrity in the discharge of his professional duties and accused him of committing the crimes of forgery and extortion. Missner also alleged that Clifford knowingly made the above false statements to the media, or made them with reckless disregard for their truth or falsity, because Clifford made no inquiries before issuing the statements, as evidenced by the fact that the arbitration attorneys, who allegedly obtained the affidavit, were not named as defendants in the Ficaro complaint. Missner attached no exhibits to his complaint.

In response, Clifford filed a combined motion for summary judgment and motion to dismiss the complaint under section 2-619(a)(9) of the Code. He argued for summary judgment on the grounds that he did not publish the statements of which Missner complains or cause them to be published. He noted that the Ficaro complaint to which Missner refers was verified by Ficaro and signed and filed by attorney Burke. In an affidavit attached to the combined motion, Clifford denied communicating with any newspaper representatives about the Ficaro complaint or the contents of the press statement of which Missner complains. He stated that he was out of town at the time the Ficaro complaint and press statement were issued and that he did not communicate with anyone in his office about the press statement or newspaper articles. He also stated that he did not review or discuss the press statement before it was issued.

Clifford also attached the affidavit of Pamela Menaker, communications partner at Clifford Law Offices. She admitted sending the press statement to the Chicago Tribune by e-mail, but had no recollection of contacting the Chicago Daily Law Bulletin. She drafted the press statement in consultation with Ficaro and Burke, but did not discuss or review the press statement with Clifford. She attached a copy of the press statement, entitled "Statement of Robert A. Clifford in response to the filing of the Amended Complaint before Judge Donald Suriano in *Ficaro v. Betzold, et al.*, No. 5 L 8474," to her affidavit.

*Appendix A*

Clifford filed a motion to dismiss in the alternative in which he asserted three affirmative defenses. First, he argued that regardless of who published the press statement, the fair report privilege protected that publication because it was a fair abridgement of the contents of a filed complaint. Second, he argued that the statements of which Missner complained could be construed innocently as "an attorney's biased presentation of his client's view of a pending cause of action." Additionally, the press statement could be "reasonably interpreted as referring to someone other than the plaintiffs." Third, he argued that the press statement is an expression of opinion protected by the first amendment. In addition to his and Menaker's affidavits, Clifford attached several exhibits to his combined motion, including a copy of the Ficaro complaint, a copy of the press statement that was sent to the Chicago Tribune, and the articles published in the Chicago Tribune and the Chicago Daily Law Bulletin.

The parties agreed to participate in limited discovery regarding the issues raised in Clifford's combined motion. As part of that agreement, Missner deposed Clifford and Menaker, noting on the record the limited scope of the deposition and the parties' understanding that the witnesses could be recalled to testify about the allegations in the underlying complaint if Missner's case survived the combined motion.

Menaker testified that she sent the press statement and a file-stamped copy of the amended Ficaro complaint to the Chicago Tribune. She relied upon the original and

amended Ficaro complaints and Burke for information about that case. She believed she had the authority of the law firm to issue a press statement in Clifford's name. She did not contact Clifford before issuing the press statement. She sent the press statement knowing that the newspaper would only accept it if it was a statement from Clifford individually and not a statement of the law firm.

In his deposition, Clifford testified that Menaker does not serve as an independent spokesperson for the law firm. She issues press statements in Clifford's name with "some measure of direction" from him. When asked whether Menaker acted as his apparent agent in issuing the press statement, Clifford stated that newspapers only accept statements from individuals and not from entities such as law firms. He added that "[u]nquestionably[, the press statement] is sent as a statement of Robert A. Clifford. Unquestionably[,] Pamela Menaker is the one who did it. Unquestionably[,] she ultimately had the authority to do so * * *."

Clifford denied that he had seen the amended Ficaro complaint before it was filed or that he participated in the drafting of it, although he had seen the original complaint before it was filed. He testified that between the time of filing the original and amended Ficaro complaints, he participated in meetings with Ficaro and others pertaining to the case and "whatever pleadings were filed or to be filed." He further stated that up to the time of filing the amended Ficaro complaint, he participated in meetings, discussions, and planning

about allegations involving the Marrocco affidavit. He also participated in strategy and planning sessions to discuss how to defend the amended Ficaro complaint.

Clifford acknowledged that Burke was authorized to include his name in the signature block on the Ficaro complaint filed with the court, although Burke signed and filed it with the court, which he also was authorized to do. Clifford stated that he does not routinely sign any pleadings himself. However, he also stated that it was not his firm's practice to routinely include his name on every pleading that was filed. Additionally, Clifford acknowledged that he had the authority to withdraw any pleading if he felt it was improperly filed for any reason, although he did not do so in this case.

In responding to the motion to dismiss, Missner preliminarily argued that the substance of Clifford's motion challenged the essential allegations of his complaint and was not proper for disposition under section 2-619(a)(9). He claimed that the three privileges asserted by Clifford were not true affirmative defenses but, rather, Clifford was attacking the factual bases of his *prima facie* case. Alternatively, Missner argued that if the court proceeded on the motion as one for dismissal, he should be permitted to use Clifford's and Menaker's depositions to rebut those factual attacks.[3] He relied on

3. Missner did not attach copies of the depositions to his response motion or cite to specific pages of the depositions. However, it appears that Missner tendered the depositions to the court in their entirety at the time of the hearing, although (Cont'd)

this argument as a basis for denial and did not seek to strike the motion.

He argued in substance that the fair report privilege did not shield Clifford from liability in this case because Clifford improperly conferred the privilege on himself, according to section 611, comment c, of the Restatement (Second) of Torts. Restatement (Second) of Torts §611, Comment c, at 299 (1977). That is, Clifford caused the publication of the original defamatory statements in the Ficaro complaint and he published a fair abridgment of those statements by way of the press statement. Additionally, Missner maintained that the press statement was not susceptible to an innocent construction nor was it a constitutionally protected statement under the first amendment. Finally, he argued that the court should deny Clifford's motion for summary judgment because the depositions provided at least circumstantial evidence that Clifford published the press statement or caused it to be published byway of an actual or apparent agency relationship with Menaker.

The court denied the motion for summary judgment. It found that Clifford authorized Menaker to issue press statements in his name. Clifford was "fully aware of and approved" the procedure by which media outlets

(Cont'd)
the transcript of the hearing is not included in the record. Nevertheless, Clifford acknowledged in a later filing that Missner tendered copies of the depositions to the court and the court's order indicates that it did have the depositions before it at the time of disposition.

contacted Menaker for press statements. Thus, a jury could reasonably conclude that Menaker was Clifford's agent for purposes of issuing the press statement, regardless of whether Clifford provided any input in drafting the statement or whether he reviewed the statement.[4]

The court then declared that "[b]ecause defendant's press statement was not included in the pleadings," the motion to dismiss was "more in the nature of a motion for summary judgment" and considered it as such. It determined that Missner had established a *prima facie* case of defamation; therefore, it had to determine whether the privileges asserted by Clifford applied to shield him from liability. It rejected Clifford's arguments that the press statement was susceptible to an innocent construction and that it was a constitutionally protected opinion under the first amendment.

As to the fair report privilege, the court acknowledged Missner's argument that one cannot confer that privilege on himself by making the original defamatory statement and reporting on it. However, it determined that Clifford did not make the original defamatory statements in the Ficaro complaint. Rather, it found that Ficaro made the statements by verifying the Ficaro complaint pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2006)). Therefore, the self-conferral exception did not preclude Clifford from asserting the fair report privilege. The court went on

4. The circuit court's ruling on the summary judgment motion is not before us on appeal.

to conclude that the press statement was a fair abridgment of the allegations contained in the amended complaint. Therefore, the press statement was privileged, regardless of whether it was he or Menaker who made the statement, and summary judgment for Clifford was appropriate.

Missner sought reconsideration of the court's ruling, first arguing that the court erred in converting the motion to dismiss to a summary judgment motion. He argued that there was no basis for such conversion where Clifford neither mislabeled nor misdesignated his motion as one for dismissal. Furthermore, he claimed that he was prejudiced because by finding that Ficaro made the original defamatory statement, the court disposed of the case on an issue that the parties had not argued and could not have investigated due to their stipulation to limit the scope of discovery.

Missner also argued on the merits that the court erred in finding that Ficaro's verification constituted a "publication" in the parlance of defamation law. He contended that a verification is an oath that the contents of the pleading are true, but the pleading is not communicated to third parties, and thus not a "publication," until it is filed with the court. Alternatively, if Ficaro's verification was the original publication of the defamatory statements, then Clifford was still liable as a republisher when he caused the Ficaro complaint to be filed.

The court declined to reconsider its order, noting that the parties treated the motion to dismiss as a summary judgment motion themselves. They engaged in discovery and relied upon extrinsic evidence in support of their arguments on the motion. They also "argued the applicability of the fair report privilege to the facts in this case. In other words, the parties structured the briefs in conformance with a motion for summary judgment."

The court also rejected Missner's claims of prejudice. First, it noted that Missner never requested additional discovery or objected to the limitations on the scope of discovery; thus, he cannot now claim that the he was unable to pursue discovery on the issue of Ficaro's verification. Additionally, it found Missner's argument that Ficaro's verification raised a new issue not addressed by the parties to be "misleading." It concluded that Missner raised the issue himself when he argued that Clifford could not self-confer the fair report privilege, forcing the court to make a determination as to who made the original defamatory statements.

On appeal, Missner reasserts the arguments made in his motion for reconsideration, namely that: (1) the circuit court erred in converting the motion to dismiss to a summary judgment motion; and (2) the [*759] court erred in applying the fair report privilege here because Clifford improperly conferred the privilege upon himself.

*Appendix A*

Missner first argues that the circuit court improperly converted the motion to dismiss into a summary judgment motion *sua sponte* after it denied the motion to dismiss. He cites to the court's dispositional order in its entirety in support of that contention. However, nothing in the text of the order indicates that the court first denied the motion to dismiss and then granted summary judgment when no motion was before it. On the contrary, the court held that Clifford's motion was "improper" under section 2-619(a)(9) and was "in the nature of a motion for summary judgment"; therefore, it would be treated as such. It made no ruling on the motion under section 2-619(a)(9).

Missner further objects to the court's conversion on the grounds that Clifford deliberately, though improperly, brought his motion as one for dismissal and did not mislabel or misdesignate the arguments in his combined motion. That, he argues, is the only permissible basis for making such a conversion under *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 723-24, 688 N.E.2d 732, 228 Ill. Dec. 34 (1997), and then only if the opposing party suffers no prejudice.

Although we are compelled to note that converting the motion from one for dismissal to one for summary judgment was unnecessary under the facts of this case, it was not reversible error because Missner has suffered no prejudice. Significantly, the court's analysis would have been the same regardless of which procedural device it employed.

*Appendix A*

Contrary to Missner's assertion below, the privileges asserted by Clifford are true affirmative defenses that maybe raised in a section 2-619(a)(9) motion to dismiss a defamation action. *Anderson v. Beach*, 386 Ill. App. 3d 246, 248, 897 N.E.2d 361, 325 Ill. Dec. 113 (2008); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 580-81, 585, 852 N.E.2d 825, 304 Ill. Dec. 369 (2006). Additionally, contrary to the circuit court's determination, section 2-619 and Supreme Court Rule 191 permit a court to consider depositions and affidavits offered in support of or in opposition to a motion to dismiss. *Stafford-Smith, Inc. v. Intercontinental River East, LLC*, 378 Ill. App. 3d 236, 239-40, 881 N.E.2d 534, 317 Ill. Dec. 366 (2007), citing *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262, 807 N.E.2d 439, 282 Ill. Dec. 815 (2004); see also 735 ILCS 5/2-619(a), (c) (West 2006); 210 Ill. 2d R. 191. Therefore, Clifford properly asserted the privileges as affirmative defenses in his section 2-619 motion to dismiss and the court should have considered them as asserted.

However, in the end, it is a distinction without a difference. When reviewing a motion to dismiss under section 2-619, the circuit court must determine whether the motion and the documents supporting it disclose any disputed issues of fact and, ultimately, whether the affirmative defense negates the plaintiff's cause of action in its entirety. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892, 823 N.E.2d 1062, 291 Ill. Dec. 476 (2005), quoting *Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.*, 261 Ill. App. 3d 338, 343, 633 N.E.2d 1003, 199 Ill. Dec. 207 (1994). Similarly,

summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 180 Ill. Dec. 691 (1992).

Thus, whether the court made that determination under section 2-619 or on summary judgment in this case, the analysis would have been the same: did the evidence submitted by the parties demonstrate the existence of a question of material fact to preclude disposition as a matter of law? As such, Missner cannot demonstrate that he was prejudiced by the court's procedural maneuver in converting the motion and there is no reason to reverse the trial court on that basis. See *Turner*, 355 Ill. App. 3d at 893; see also *Malanowski*, 293 Ill. App. 3d at 724. Missner's stated claim that he suffered prejudice because he was unable to conduct discovery on or otherwise respond to the court's finding that Ficaro made the original defamatory statement is best addressed below in our review of the substance of the court's order.

The circuit court determined that Missner established a *prima facie* case of defamation *per se*. See *Solaia Technology*, 221 Ill. 2d at 579-80 (describing five categories of statements that are defamatory *per se*). However, even a statement that is defamatory *per se* may not be actionable if an absolute or qualified privilege applies to shield a defendant from liability. *Solaia Technology*, 221 Ill. 2d at 580-81, 585. Here, we review the circuit court's determination that as a matter of law,

Clifford was entitled to assert the fair report privilege and was not precluded from doing so by the self-conferral exception.

The fair report privilege is a qualified privilege that protects:

> "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern * * * if the report is accurate and complete or [is] a fair abridgement of the occurrence reported." Restatement (Second) of Torts §611, at 297 (1977) (as adopted by our supreme court in *Solaia Technology*, 221 Ill. 2d at 585).

It is an exception to the general common law rule that the republisher of defamatory material bears the same degree of liability for defamation as the original publisher. *Catalano v. Pechous*, 83 Ill. 2d 146, 168, 419 N.E.2d 350, 50 Ill. Dec. 242 (1980); S. Terilli, S. Splichal, & P. Driscol, *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court of Public Opinion*, 12 Comm. L. & Pol'y 143, 157-58 (2007); 1 R. Sack, Sack on Defamation: Libel, Slander & Related Problems, 7-2, 7-3 (3d ed. 2004) (noting that courts traditionally refuse to distinguish between "tale bearers" and "tale makers"). This privilege protects our system of self-governance and serves the public interest by permitting access to all public proceedings, and judicial

proceedings and filings in particular, regardless of whether defamatory statements are made in those proceedings. *Solaia Technology*, 221 Ill. 2d at 585, 600 (Freeman, J., concurring in part and dissenting in part) (explaining that the privilege is based on several theories arising out of a reporter's roles as agent for the public, government watchdog, and educator). These larger civic interests outweigh a competing interest in compensating persons for loss of reputation resulting from publication of defamatory statements contained in public or judicial proceedings. *Solaia Technology*, 221 Ill. 2d at 599 (Freeman, J., concurring in part and dissenting in part), quoting J. Lee & B. Lindall, Modern Tort Law §36:32, at 36-47 (2d ed. 2002).

Both media and nonmedia reporters may claim protection under the privilege. Restatement (Second) of Torts §611, Comment c, at 299 (1977); *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 707, 742 N.E.2d 425, 252 Ill. Dec. 175 (2000). But see B. Wessel, *Libel Claims Against Lawyers for Statements Made to the Press*, 16 Fall Comm. Law. 21, 22 (1998) (noting that some jurisdictions limit the application of the privilege to media reporters only). However, the availability of the privilege does not depend on the status of the reporter; rather, it is conditioned upon the fairness and accuracy of the report. *Solaia Technology*, 221 Ill. 2d at 599 (Freeman, J., concurring in part and dissenting in part), citing J. Lee & B. Lindall, Modern Tort Law §36:24, at 36-39 (2d ed. 2002). For example, a reporter abuses the privilege when he mischaracterizes an allegation in a pleading as a fact or adds information to the report that

was not part of the official proceeding. 12 Comm. L. & Pol'y, at 162. Many of the cases involving the fair report privilege focus on the content of the report in relationship to the original defamatory statement. See, *e.g.*, *Solaia Technology*, 221 Ill. 2d at 595-96; *Myers v. The Telegraph*, 332 Ill. App. 3d 917, 924, 773 N.E.2d 192, 265 Ill. Dec. 830 (2002).

However, before a court can determine whether the fair report privilege has been abused, it must first decide whether the privilege applies where it is asserted. Application of the privilege varies by jurisdiction and is controlled by statute in a few states. 16 Fall Comm. Law. at 22; see, *e.g.*, N.Y. Civ. Rights Law §74 (1992) (fair report privilege applies to any person, firm, or corporation reporting on public proceedings); Cal. Civ. Code §47 (2004) (any report of public proceedings is privileged, except as noted therein); Tex. Civ. Prac. & Rem. Code Ann. §73.002 (2005) (fair report privilege applies to media reporters alone in reporting on public proceedings).

Under the common law rule, "[a] person cannot confer [the fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated" under the guise of privilege, even if the original publication was itself privileged. Restatement (Second) of Torts §611, Comment *c*, at 299 (1977). Some jurisdictions have modified the common law rule to specifically afford litigants or their attorneys heightened protection for reporting on the contents of pleadings they have

published or court proceedings in which they participate. 16 Fall Comm. Law. at 22; see, *e.g.*, *Rosenberg v. Helinski*, 328 Md. 664, 685-86, 616 A.2d 866, 876-77 (1992) (rejecting section 611, comment *c*, and holding that the "[fair report] privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place. * * * It is clear that [the privilege] * * * aims to deter those persons who, acting out of a corrupt defamatory motive, abuse the privilege accorded to fair and accurate reports of judicial proceedings").

Although our supreme court has not squarely addressed this threshold issue, it has otherwise adopted section 611 of the Restatement (Second) of Torts, including comment *c*. *Catalano*, 83 Ill. 2d at 167-68; *Solaia Technology*, 221 Ill. 2d at 588, quoting Restatement (Second) of Torts §611, Comment c, at 299 (1977). See also *Kurczaba*, 318 Ill. App. 3d at 707-08 (concluding, with little discussion, that the privilege did not apply where an attorney published the defamatory contents of a pleading he also drafted). The court's endorsement of section 611, comment c, is made without reservation, unlike its treatment of section 611, comment *e*. *Solaia Technology*, 221 Ill. 2d at 588-89 (rejecting section 611, comment *e*, which would have required that a court take some judicial action in a matter before a reporter could publish a report on the contents of a pleading). Therefore, we are bound to apply section 611, comment c, in accordance with supreme court precedent. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440, 892 N.E.2d 994, 323 Ill. Dec. 2 (2008).

Clifford claims that the fair report privilege protects him from liability in this case because even if he did publish the press statement, the original defamatory statements in the Ficaro complaint were published either by Ficaro through his verification of the complaint or by Burke at the time he filed the complaint with the court. The circuit court determined as a matter of law that Ficaro published the original defamatory statements contained in the complaint by way of verification. Additionally, it concluded that Clifford's press statement was a fair report of the Ficaro complaint; therefore, Clifford was protected by the fair report privilege.

We disagree. Ordinarily, determining the applicability of a privilege is a question of law. *Solaia Technology*, 221 Ill. 2d at 585. However, in this case, there remains a question of material fact as to who published the original defamatory statements; therefore, summary judgment was improper.

"Publication" is a term of art in defamation law and is an essential element of any defamation claim. *Emery v. Northeastern Illinois Regional Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1021-22, 880 N.E.2d 1002, 317 Ill. Dec. 10 (2007). Any act by which defamatory matter is communicated to someone other than the person defamed is a publication. *Anderson*, 386 Ill. App. 3d at 249; Restatement (Second) of Torts §577, Comment *a*, at 201-02 (1977). To "communicate" means to convey information to another. Webster's Third New International Dictionary 460 (1981). Whether a

publication occurred at all is a question for the jury. Restatement (Second) of Torts §617, Comment *a*, at 315 (1977).

We have previously recognized that the filing of an amended complaint may constitute a publication. *Withall v. Capitol Federal Savings of America*, 155 Ill. App. 3d 537, 542, 508 N.E.2d 363, 108 Ill. Dec. 202 (1987). We have also recognized that the communication of defamatory statements between agents of the same principal, arguably as between Clifford and Burke, is a publication. *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 264-65, 823 N.E.2d 184, 291 Ill. Dec. 174 (2005); Restatement (Second) of Torts §577, Comment *i*, at 201-02 (1977). Additionally, the communication of defamatory material from a principal to his agent, as in an attorney-client relationship, also may be a publication. Restatement (Second) of Torts §577, Comment *e*, at 203 (1977). Although such publications may themselves be privileged, that does not affect the applicability of the fair report privilege. Restatement (Second) of Torts §611, Comment *c*, at 299 (1977).

On the other hand, our research has revealed no support for the proposition that a verification constitutes a publication, nor has Clifford provided us with any. The circuit court relied solely on section 1-109 of the Code to support its position; however, we are not convinced that the language of the statute alone brings a verification within the broad definition of a "publication." A section 1-109 verification is a communication to the court that the verifier attests,

under penalty of perjury, that the statements contained in a pleading are true. 735 ILCS 5/1-109 (West 2006); 3 R. Michael, Illinois Practice §23.7, at 326-27 (1989) ("Verification consists of an oath of the truthfulness of the pleading"). However, a verification does not stand on its own; it is submitted to the court along with the pleading to which it refers. That is, the statements being verified are not communicated until the pleading is filed with the court. Therefore, a verification is not, by itself, a publication.

Whether a verifier, or any other person, participated in the publication is a different, but related, question. Restatement (Second) of Torts §617, Comment *a*, at 315 (1977). "All persons who cause or participate in the publication of [defamatory] matters are responsible for such publication." *Van Horne v. Muller*, 185 Ill. 2d 299, 308, 705 N.E.2d 898, 235 Ill. Dec. 715 (1998), quoting 33A Ill. L. & Prac. *Slander and Libel* §83 (1970). In fact, in Van Horne, the supreme court established that more than one person may be liable for defamation based on their participation in the publication. *Van Horne*, 185 Ill. 2d at 308 (holding that plaintiff adequately alleged that a morning radio host and his sidekick "both participated in the publication" of the same defamatory story). Once again, however, that question is reserved for the jury. *Colmar v. Greater Niles Township Publishing Corp.*, 13 Ill. App. 2d 267, 277, 141 N.E.2d 652 (1957); Restatement (Second) of Torts §617, Comment *a*, at 315 (1977). Although a court may make that determination as a matter of law where the evidence is so overwhelming that it presents "with convincing clarity," the evidence in this case is far from convincing.

Restatement (Second) of Torts §617, Comment *a*, at 315 (1977). Accordingly, the circuit court erred in deciding as a matter of law that Ficaro published the original defamatory statement through verification when that question belonged within the province of the jury.

Moreover, even if Ficaro's verification could be said to be a publication, that does not preclude the possibility that Clifford and Burke also may be liable for that publication. See *Van Horne*, 185 Ill. 2d at 308; *Catalano*, 83 Ill. 2d at 168. It follows that if either or both of them did participate in the publication of the original defamatory statements, the self-conferral exception would preclude them from enjoying the benefit of the fair report privilege as well. Here, the record contains some evidence that Clifford and Burke participated in the publication. For example, Burke signed the Ficaro complaint and filed it with the court, according to Clifford.

Additionally, and for the purposes of this case, the original and amended Ficaro complaints list Clifford as the lead attorney in Ficaro's defamation suit against Missner, with the signature block on those pleadings appearing as follows:

> "***ATTORNEYS FOR PLAINTIFF***
> Robert A. Clifford
> Richard F. Burke, Jr.
> Shannon M. McNulty
> CLIFFORD LAW OFFICES, P.C.
> 120 N. LaSalle Street, 31st Floor
> Chicago, Illinois 60602"

Clifford testified that although he infrequently signed any pleadings filed on behalf of his clients, it was not his firm's practice to include his name on all pleadings simply as a matter of course. Although he testified that he did not sign, review, or approve the content of the amended complaint before it was filed, he admitted that he was involved in planning meetings and discussions pertaining to "pleadings [that] were filed or to be filed" between the time of filing the original and amended Ficaro complaints. He also admitted that he was involved in strategy discussions regarding how to defend the amended Ficaro complaint after it was filed. He testified that he had the authority to withdraw a filed pleading that he felt was for any reason improper, although he did not do so in this case.

This evidence is sufficient to pose a question of fact as to whether Clifford participated in the publication of the original defamatory statements, which publication may have occurred at the time the Ficaro complaint was filed or at another time determined by the jury. See *Van Horne*, 185 Ill. 2d at 308; *Colmar*, 13 Ill. App. 2d at 277. Additionally, the circuit court has already determined that a question of fact exists as to whether Clifford was responsible for publishing the press statement. Therefore, we cannot say as a matter of law that the fair report privilege applies notwithstanding the self-conferral exception. The circuit court erred in granting summary judgment in Clifford's favor on this issue. Accordingly, we reverse the circuit court's order and remand for further proceedings.

*Appendix A*

Following our opinion, Clifford filed a petition for rehearing, arguing that we should have addressed the additional arguments asserted in his original motion to dismiss in the circuit court. In the interest of completeness, we address those issues below.

In addition to arguing for the application of the fair report privilege, Clifford argued that the press statement was entitled to an innocent construction because it did not name Missner as a participant in the forgery and extortion. Therefore, he argued, it was not actionable as defamation *per se*. The complete press statement reads as follows:

> "Statement of Robert A. Clifford in response to the filing of the Amended Complaint before Judge Donald Suriano in Ficaro v. Betzold, et al., No. 5 L 8474:
>
> As set forth in detail in an Amended Complaint filed in the Cook County Circuit Court today (Tuesday, Dec. 6, 2005), Mike Ficaro has been defamed and greatly wronged as a result of intentional [*sic*] false and scurrilous statements made public by the defendants in an attempt to improperly influence the outcome of some vigorously contested litigation involving tens of millions of dollars.
>
> The Amended Complaint alleges that one or more of the defendants forged the

> signature of an ex-FBI agent to a fictitious created [*sic*] false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.
>
> The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit. Mike Ficaro is a highly experience [*sic*] former prosecutor and civil litigator who has enjoyed an impeccable reputation both professionally and personally throughout his long career. We know that he will be vindicated in the court of law."

A file-stamped copy of the Amended Complaint also accompanied the transmission of this press statement.

Whether an allegedly defamatory statement is entitled to an innocent construction in an action for defamation *per se* is a question of law, which we review *de novo*. *Tuite v. Corbitt*, 224 Ill. 2d 490, 503, 511, 866 N.E.2d 114, 310 Ill. Dec. 303 (2006). Whether the statement was understood to be defamatory or refer to the plaintiff is a question for the jury if the innocent construction issue is resolved in the plaintiff's favor. *Tuite*, 224 Ill. 2d at 503.

The court must consider the allegedly defamatory statement "'in context, with the words and the implications therefrom given their natural and obvious meaning.'" *Tuite*, 224 Ill. 2d at 503, quoting *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 65 Ill. Dec. 884 (1982). The context of the defamatory statements is critical in determining its meaning. Tuite, 224 Ill. 2d at 512, citing *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 93-94, 672 N.E.2d 1207, 220 Ill. Dec. 195 (1996). Thus, in determining the context of the defamatory statements, we must read the writing containing the defamatory statement "'as a whole.'" *Tuite*, 224 Ill. 2d at 512, quoting *John v. Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E.2d 105 (1962). We then interpret the allegedly defamatory words "'as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader.'" *Tuite*, 224 Ill. 2d at 504, quoting *Bryson*, 174 Ill. 2d at 93. If the statement may "'reasonably be interpreted as referring to someone other than the plaintiff[,] it cannot be actionable *per se*.'" *Tuite*, 224 Ill. 2d at 503, quoting *Chapski*, 92 Ill. 2d at 352.

We recognize that *Bryson*, rather than *Chapski*, is the leading supreme court case addressing the identity of the plaintiff in an innocent construction analysis. However, we decline to apply the *Bryson* analysis in this case. First, *Bryson* applies to cases in which the plaintiff has not been named in the defamatory statement. *Bryson*, 174 Ill. 2d at 96-97. As discussed below, the press statement does identify Missner in this case. Additionally, as this court stated in *Imperial Apparel*,

the legal analysis in *Bryson* deviates somewhat from the rule set forth in *Chapski*. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 367 Ill. App. 3d 48, 57, 853 N.E.2d 770, 304 Ill. Dec. 693 (2006), *rev'd on other grounds*, 227 Ill. 2d 381, 882 N.E.2d 1011, 317 Ill. Dec. 855 (2008). Therefore, we adhere to the rule stated in Chapski and recently reaffirmed in *Solaia Technology*, 221 Ill. 2d at 580-81, to analyze whether the innocent construction rule applies to bar plaintiff's claim for defamation *per se*. *Imperial Apparel*, 367 Ill. App. 3d at 58, *rev'd on other grounds*, 227 Ill. 2d 381, 882 N.E.2d 1011, 317 Ill. Dec. 855 (2008).

Here, Menaker sent the press statement to the Chicago Tribune via email with a file-stamped copy of the Ficaro complaint attached. The opening line of the press statement directed the reader to reference the Ficaro complaint for details about the "intentional [*sic*] false and scurrilous statements made public by the defendants" in attempting to "improperly influence the outcome of some vigorously contested litigation." Additionally, the press statement described the forgery and extortion committed by "one or more of the defendants" named in the Ficaro complaint. In order to understand the allegedly defamatory statements in context, we must examine the press statement together with the Ficaro complaint to which it refers. See *Tuite*, 224 Ill. 2d at 512 (examining allegedly defamatory statements in the context of the entire book in which they were published); see also *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 570, 793 N.E.2d 760, 276 Ill. Dec. 1 ("a newspaper article and the text of the

article to which it refers are to be considered as one document and read together as a whole").

In that context, the press statement is not entitled to an innocent construction. It asserted that "one or more" of the defendants named in the amended Ficaro complaint, filed on a specific date in a specific case pending in the Cook County Circuit Court, engaged in forgery and extortion. Additionally, it described how the "derogatory and defamatory statements" made by "these attorneys" caused Ficaro to file his lawsuit. The Ficaro complaint named David Missner and William Choslovsky, individually and as employees of their law firm, and Larry Levin, individually and as an employee of his law firm, as well as Betzold and two unnamed individuals, as defendants. Missner, Choslovsky, and Levin are the only "attorneys" accused of engaging in forgery and extortion and making derogatory and defamatory statements about Ficaro. On the contrary, this court found that the allegedly defamatory advertisement in *Imperial Apparel* failed to identify the plaintiffs because it only referred to the plaintiffs by their first names and did not provide any other identifying features, such as the name of the store plaintiffs owned. *Imperial Apparel*, 367 Ill. App. 3d at 58, *rev'd on other grounds*, 227 Ill. 2d 381, 882 N.E.2d 1011, 317 Ill. Dec. 855 (2008).

Although the press statement accuses three individuals of forgery and extortion, we conclude that all of them were adequately identified such that any one of them may claim to have been defamed by the press

statement. We again rely on the Restatement (Second) of Torts in support of this conclusion. Section 564A of the Restatement provides that a publisher of defamatory material may be liable to an individual member of a group defamed "if, but only if * * * the circumstances of publication reasonably give rise to the conclusion that there is particular reference" to a member of that group. Restatement (Second) of Torts §564A(b), at 167-68 (1977). Specifically, when the defamed group is sufficiently small and the words may reasonably be understood to have personal reference and application to any member of the group, that group member is defamed as an individual. Restatement (Second) of Torts §564A, Comment *b*, at 168 (1977). For example, where a newspaper accuses the officers of a corporation with embezzlement, and there are only four officers, any one of the officers may have been defamed. Restatement (Second) of Torts §564A, Illustration 3, at 169 (1977).

Here, the press statement cannot reasonably be interpreted as referring to anyone other than the three attorney-defendants, Missner, Choslovsky, and Levin. See *Tuite*, 224 Ill. 2d at 503; Restatement (Second) of Torts §564A, Illustration 3, at 169 (1977). Indeed, in the subsequent article published in the Chicago Tribune, the reporter quoted directly from the press statement in recounting that "'one or more of the [libel case] defendants forged the signature of an ex-FBI agent to a fictitious, created, false and untrue affidavit'" and that "'[t]he affidavit was intended to extort Ficaro and his law firm into settling.'" The article then specifically identified "attorneys Larry Levin, David Missner and

William Choslovsky" as "defendants in the case." Accordingly, we interpret the press statement as referring to Missner and the other attorney-defendants just as it was interpreted by the reporter to whom it was sent. See *Tuite*, 224 Ill. 2d at 504, quoting *Bryson*, 174 Ill. 2d at 93 (courts "'interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader'"). Thus, the press statement is not entitled to an innocent construction and we therefore affirm the circuit court's judgment in rejecting this argument. Tuite, 224 Ill. 2d at 503, quoting *Chapski*, 92 Ill. 2d at 352.

Clifford also argued that the press statement expressed constitutionally-protected opinions, not facts, because "it presents a trial lawyer's litigation position — or opinion — as to his client's claim." A statement that is defamatory *per se*, but not subject to an innocent construction, may nevertheless enjoy constitutional protection under the first amendment. *Solaia Technology*, 221 Ill. 2d at 581. However, whether Clifford may claim the constitutional protection that he seeks here is an unsettled question. *Imperial Apparel*, 227 Ill. 2d at 400. The first amendment applies to protect a statement of opinion only where: (1) the cause of action is brought by a public official; (2) the cause of action is brought by a public figure; or (3) the cause of action is brought by a private individual against a media defendant. *Imperial Apparel*, 227 Ill. 2d at 399. Missner has made no allegation that he is a public official or a public figure, nor is there any contention that Clifford

is a media defendant. Our supreme court has yet to determine whether this constitutional protection extends in cases such as this, where a private party has defamed another private party on a matter of public or private concern. *Imperial Apparel*, 227 Ill. 2d at 399; *Green v. Rogers*, 384 Ill. App. 3d 946, 965, 895 N.E.2d 647, 324 Ill. Dec. 152 (2008). The parties do not discuss whether the first amendment applies under these circumstances and we decline to resolve the issue here.

Nevertheless, even if the constitutional privilege did apply under these circumstances, the defamatory statements at issue in this case are not entitled to protection under the first amendment. An allegedly defamatory statement is only entitled to first amendment protection if it cannot be reasonably interpreted as stating actual fact. *Imperial Apparel*, 227 Ill. 2d at 398; *Solaia Technology*, 221 Ill. 2d at 581. In order to make that determination, we examine the following criteria: (1) whether the statement has a precise and readily understood meaning; (2) whether the statement is verifiable; and (3) whether the statement's literary or social context signals that it has factual content. *Imperial Apparel*, 227 Ill. 2d at 398. The statement is viewed from the perspective of the ordinary reader. *Imperial Apparel*, 227 Ill. 2d at 398.

First, the statements in the press release have a precise and readily understood meaning. They accused Missner and the other attorney-defendants of forgery and extortion, both offenses that an ordinary reader would consider criminal acts. See, e.g., *Krueger v. Lewis*,

342 Ill. App. 3d 467, 471, 794 N.E.2d 970, 276 Ill. Dec. 720 (2003) (finding that words implicating the plaintiff in a bribery scheme alleged the commission of a crime such that it constituted defamation *per se*); *Solaia Technology*, 221 Ill. 2d at 584-85 (finding that accusing a company of filing lawsuits solely to extract settlements impugns its integrity).

Second, the accusations in the press statement may be objectively verified as being true or false. It is possible to determine whether Marocco personally signed the contested affidavit or whether it was forged, and if so, by whom. Moreover, it is possible to ascertain whether Missner or the other attorney-defendants attempted to use the Marocco affidavit in an extortionate manner to extract a settlement in the underlying arbitration. See *Imperial Apparel*, 227 Ill. 2d at 402; *Green*, 384 Ill. App. 3d at 964.

Finally, the press statement is replete with details that would indicate to the ordinary reader that it contains factual content. It asserted that it was the statement of Robert A. Clifford and that the statement was made in conjunction with the filing of the attached amended complaint in "*Ficaro v. Betzold, et al.*, No. 5 L 8474," then pending before Judge Donald Suriano in the Cook County Circuit Court. It explained that the amended complaint was filed in Ficaro's defense as a result of the allegedly illegal acts committed by Missner and the other attorney-defendants. It asserted that the affidavit filed in the bankruptcy proceeding was filed for the very specific purpose of influencing the outcome

of a pending litigation in which tens of millions of dollars were at stake. These are very particular accusations and explanations for the filing of the complaint, unlike the "artless, ungrammatical, sophomoric and sometimes nonsensical" allegations at issue in *Imperial Apparel*. See *Imperial Apparel*, 227 Ill. 2d at 401 (where the defamatory statement referred to a retail competitor's clothing store using hyperbolic phrases such as "rags," "flea market style warehouse," "dried cream cheese," "low rent," "a hooker[']s come on," and asserted that the plaintiffs had "all the integrity of the 'Iraq Information Minister'"). Thus, the contents of the press statement, considered in their proper context, could reasonably be interpreted as stating facts and would not be protected by the first amendment, if that privilege were found to apply.

Clifford cited several cases in support of his contention that the press statement contained vague and unverifiable claims that "a reader could conclude * * * were part of the posturing between one side and another" in ongoing litigation. However, as we have discussed, a defamatory statement may only be considered a non-actionable opinion if it cannot be construed as stating actual facts about the plaintiff; whether a reader could find an innocent interpretation of the statement is irrelevant. *Imperial Apparel*, 227 Ill. 2d at 397; *Solaia Technology*, 221 Ill. 2d at 581. Nevertheless, the allegedly defamatory statements at issue in the cases cited differ in quality and degree from those contained in the press statement at issue here. *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 776 N.E.2d

693, 267 Ill. Dec. 321 (2002) (finding the statement "the evidence seems to indicate that you're cheating the city" lacked any factual context and did not explain the evidence to which it referred); *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 701 N.E.2d 99, 233 Ill. Dec. 456 (1998) (finding the isolated phrase "fired because of incompetence" non-actionable because it was uttered without any specific factual context and was too broad, conclusory, and subjective to be objectively verifiable). See also *Rose v. Hollinger International, Inc.*, 383 Ill. App. 3d 8, 13-17, 889 N.E.2d 644, 321 Ill. Dec. 379 (2008) (summarizing cases in which courts have found actionable and non-actionable opinion in defamation cases). Here, the press statement provided specific details about the filing of the Ficaro complaint and the rationale for doing so. Thus, it could reasonably be interpreted as stating actual facts about Missner's involvement in that context. Therefore, we affirm the circuit court's judgment on this issue.

The remaining points in Clifford's petition for rehearing attempt to reargue the positions asserted in his appellee's brief. We have addressed those arguments in the foregoing opinion and decline to address them further. Accordingly, for all of these reasons, we affirm in part and reverse in part and remand for further proceedings.

Affirmed in part and reversed in part; cause remanded.

J. GORDON and CAHILL , JJ., concur.

## APPENDIX B — ORDER OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT DATED JULY 31, 2009

SIXTH DIVISION
July 31, 2009

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Nos. 1-07-1469 and 1-07-3433
(consolidated)

Appeal from the Circuit Court of Cook County, Illinois

No. 05 L 8474

MICHAEL A. FICARO, Individually,

Plaintiff/Appellant/Cross-Appellee,

v.

FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD., f/k/a LEVIN & SUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP, f/k/a PIPER RUDNICK, LLP, WILLIAM CHOSLOVSKY, Individually and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP, f/k/a PIPER RUDNICK, LLP, JANE DOE and JOHN DOE,

Defendants/Appellees/Cross-Appellants.

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NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, individually and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD., f/k/a LEVIN & SUNKHOUSER, LTD.,

Defendants/Appellees.

The Honorable Susan F. Zwick, Judge Presiding.

**ORDER**

Plaintiff, Michael A. Ficaro, filed a complaint against defendants Nicholas Betzold, Jr.; Larry Levin[1]; Funkhouser, Vergosen, Liebman & Dunn, Ltd. (Funkhouser); David Missner; DLA Piper, Rudnick, Gray, Cary U.S., LLP (DLA); and William Choslovsky; alleging, *inter alia*, intentional defamation, negligent defamation, false light invasion of privacy, civil conspiracy, aiding and abetting, concert of action, and tortious interference with prospective economic advantage. Defendants filed a motion to dismiss, which the trial court granted, dismissing the cause with prejudice. On appeal plaintiff contends that the trial court erred in (1) finding that the attorney litigation privilege absolutely barred plaintiff's claims for intentional defamation, negligent defamation, false light invasion of privacy, civil conspiracy, aiding and abetting, and concert of action; (2) finding that the attorney litigation privilege

1. Levin is also referred to as "Levine" in the record. For the sake of clarity, we shall refer to this defendant solely as Levin.

absolutely barred plaintiff's claim for defamation relating to alleged leaks of defamatory statements to the press; and (3) dismissing plaintiff 's claim for tortious interference with prospective economic advantage under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2006)). Plaintiff also contends that Illinois should recognize some limitation to the attorney litigation, privilege. Finally, defendants cross-appeal the trial court's denial of its motion for sanctions under Supreme Court Rule 137 (155 Ill. 2d R. 137). For the following reasons, we affirm the judgment of the circuit court.

## BACKGROUND

The record in this case reveals the following. Defendant Nicholas Betzold, Jr., owned approximately 51% of the stock in The Betzold Companies (the companies) and used his controlling position in the company to make payments to himself. In October 2002, Betzold filed a petition for arbitration against two of three minority shareholders, seeking a declaration that those payments were authorized under the shareholders' agreement. Levin, a board member and legal advisor to the companies, was one of the principal negotiators and drafters of the shareholders' agreement. Other attorneys at Funkhouser also participated in the negotiation and drafting of the shareholders' agreement. In 2003, plaintiff appeared as legal counsel for the minority shareholders and conducted the arbitration in March 2004. Kevin Van Wart and Jonathan Hinkemeyer from the law firm of Kirkland

and Ellis LLP (Kirkland) represented Betzold. The arbitrator assigned to the dispute was former circuit court judge Thomas Hett.

Following a three day evidentiary hearing and closing arguments, Hett found that Betzold's payments were not authorized by the shareholders' agreement and that Betzold was liable to the minority shareholders. The matter was continued for another evidentiary hearing to determine damages, although a prior deposition of the minority shareholders' expert indicated that their damages totaled $12.5 million to $15 million.

Betzold and Levin then filed a motion to remove Hett as the arbitrator, alleging that Hett and Ficaro had an inappropriate and undisclosed relationship. In addition, Betzold and Levin also filed a motion to reconsider the arbitrator's finding. The matter was stayed while an independent, neutral, arbitrator that was selected by the arbitration service heard arguments on the motion to remove Hett as the arbitrator. The neutral arbitrator subsequently denied the motion to remove Hett as the arbitrator. Hett then set the matter for a damages hearing on August 3, 2004.

Following the denial of the motion to remove Hett, Betzold retained Missner, Choslovsky, and DLA as bankruptcy counsel. On August 2, 2004, the day before the damages hearing before Hett was to begin, DLA filed a chapter 11 bankruptcy petition on behalf of Betzold in the United States Bankruptcy Court for the

Northern District of Illinois. The bankruptcy petition was an adversary complaint against the minority shareholders and the companies seeking to have the bankruptcy court adjudicate the dispute between Betzold and the minority shareholders because of the alleged improper relationship between plaintiff and Hett. In addition, DLA filed a motion to enforce the automatic stay in order to enjoin the arbitration hearing on damages.

In support of its petition, DLA referenced two exhibits[2]: one signed by Francis N. Marrocco, a former agent of the Federal Bureau of Investigation (FBI), and the other signed by an individual named Robert Cooley. Both documents concerned an alleged undisclosed relationship between Hett and Ficaro.

Marrocco's document was signed on June 22, 2004, captioned with the arbitration matter, and entitled "Affidavit of Francis N. Marrocco." The document indicated that Marrocco's "statements in this affidavit are to the best of my personal recollection and are based on my personal knowledge and information * * * and, if called as a witness, I could and would testify thereto." The document then provided that Marrocco had been the "Special Agent at the [FBI] in charge of an* * *

2. Although the parties agree that the Cooley declaration was attached to DLA's petition, the parties disagree as to whether the Marrocco affidavit was also attached or filed separately. Because the parties agree at least that the Marrocco affidavit was filed with the bankruptcy court, our analysis does not change based upon whether it was attached to the petition.

investigation into organized crime," and that, during the course of his investigation into organized crime, the FBI conducted wire taps over a five-year period. On "at least five occasions," they intercepted Ficaro "in conversations of an incriminating nature." Marrocco then stated that, shortly after confronting Ficaro with information obtained during the investigation, Ficaro resigned from the Illinois Attorney General's office. Lastly, the document included a provision that, pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2006)), Marrocco certified that his statements were true and correct.

Cooley's "declaration" was signed on July 15, 2004, and alleged that he saw both plaintiff and Hett in attendance at various political fundraisers and other functions. Cooley also claimed that he assisted the United States Attorney's' office in uncovering corruption in "the court system of the City of Chicago" by secretly recording conversations with various individuals, including former Judge Frank Wilson, who was being investigated for allegedly accepting a bribe to "fix" the murder trial of Harry Aleman, and that Marrocco was one of the FBI agents he worked with during the investigation of the Aleman trial.

Cooley further claimed that Pat Marcy, the "'secretary'" of the first ward democratic organization, informed him that plaintiff was the first ward's primary contact in the State's Attorney's office and was placed there by Marcy to "do tasks for * * * Marcy." According to Cooley, Marcy also told him that plaintiff could help

Cooley fix the Aleman case, and that plaintiff gave the entire State's Attorney's file on the Aleman case to Marcy, who then gave the file to Cooley.

Cooley also stated that, "in my presence," plaintiff referred to Marcy as "'Uncle Pat'" and met with Marcy regularly when plaintiff was a supervisor in the Cook County State's Attorney's office. In addition, Cooley stated that he "personally observed * * * on many occasions" plaintiff meeting with Marcy while he and Marcy were fixing the Aleman trial.

Cooley next claimed that Marcy said that (1) he had arranged for plaintiff to be appointed to the Illinois Attorney General's office "to handle activities" for him, and (2) he was "instrumental" in making Hett the mayor of Berwyn and then a trial judge.

Marcy also informed Cooley that Hett was a "'player'" and that this was confirmed by the chief clerk of the Cook County criminal court, Frank Bailey, whom Cooley had "used" in fixing other cases. Cooley added that Louis Pannos, who allegedly ran an illegal gambling operation in Berwyn when Hett was the mayor, told Cooley "similar info" about Hett.

The minority partners then filed a motion to lift the automatic stay and a motion to strike the statements by Marrocco and Cooley. On October 14, 2004, the federal bankruptcy court granted the motion to lift the stay. At the hearing on the minority partners' motions, counsel for the minority partners argued that there was an

evidentiary basis in the motion to strike and noted the "scandalous nature of the allegations and the attack on my partner's reputation." Counsel then stated that "we would like them withdrawn." The federal court found that the motion to enforce the automatic stay was moot, and stated that "the motion is withdrawn." Plaintiff subsequently alleged that the parties entered into a settlement agreement prior to the damages hearing before the arbitrator.

In July 2005 and August 1, 2005, plaintiff's law partner, Dean Polales, met with Marrocco. According to Polales, Marrocco stated that he had met with Levin in June 2004 because Levin was seeking adverse information about plaintiff's and the arbitrator's relationship. Levin sent a written statement to Marrocco purportedly summarizing their conversation, but Marrocco refused to sign it due to inaccuracies. Polales then stated that when he showed Marrocco the affidavit filed in the federal court with Marrocco's name, Marrocco denied signing that affidavit. Polales relayed this information to plaintiff. According to Polales, Marrocco refused to sign another affidavit regarding this conversation because Marrocco's attorney told Marrocco not to become involved.

On August 2, 2005, plaintiff filed a verified complaint against DLA and other defendants alleging, *inter alia*, defamation and false light invasion of privacy predicated upon the Cooley declaration and Marrocco affidavit. On September 9, 2005, DLA filed a motion to dismiss based upon the absolute litigation privilege and Supreme

Court Rule 137 (155 Ill. 2d R. 137). Eventually, plaintiff filed a motion seeking leave to file an amended complaint rather than respond to DLA's motion to dismiss, which the trial court granted, directing plaintiff to file his amended complaint by December 6, 2005.

On December 2, 2005, plaintiff served DLA with his request for documents, seeking the "original" of the Marrocco affidavit. Four days later, and prior to DLA's deadline to respond to plaintiff's discovery request (December 30, 2005), plaintiff filed his verified amended complaint, alleging, *inter alia*, that "on information and belief," one or more of defendants forged Marrocco's affidavit. Plaintiff claimed that Marrocco had seen the affidavit, but denied signing it, and that Marrocco's signature was "cut and pasted" onto the affidavit at the behest of one or more of defendants.

The cause was removed to federal court, and then remanded back to the trial court following dismissal of certain federal claims, and DLA filed a motion to dismiss this complaint based upon the absolute litigation privilege and affidavits of Hinkemeyer, an attorney at DLA, and James Hayes, a document examiner. Hinkemeyer's affidavit indicated that he procured Maffocco's affidavit, and that Marrocco told him that the information in it was correct and that Marrocco would sign the affidavit. Hayes's affidavit opined that the signature on Marrocco's affidavit was made directly onto the document by a pen and that the signature was not cut and pasted.

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At the hearing on DLA' s motion to dismiss, the trial court continued the matter for status and ordered the deposition of Marrocco. Marrocco petitioned the trial court for a protective order to treat his videotaped deposition, including any personal information, as confidential. In his petition, Marrocco noted that plaintiff objected to the protective order and "any type" of confidentiality.

Marrocco's deposition took place on September 13, 2006, and revealed that he signed the affidavit and all of the information in the affidavit was true and correct at the time he signed it. Marrocco further stated that, in the summer of 2005, he met with plaintiff's law partner, Dean Polales, approximately one Year after signing the affidavit and informed Polales that he did not recognize the part of his affidavit referring to a hearing transcript at JAMS and stated that he would need to see the entire affidavit before he could say anything "official" regarding whether he signed the affidavit. Marrocco then refused Polales's request to sign a second affidavit indicating that he had not signed the June 2004 affidavit.

Plaintiff then filed a motion for a protective order asking that Marrocco's videotaped deposition and transcript be treated as confidential, to which DLA objected. The trial court eventually denied plaintiff's motion, but ordered Marrocco's personal information redacted from the transcript.

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On November 14, 2006, plaintiff filed a motion for leave to file a second amended complaint, which removed the forgery allegations and added claims for aiding and abetting and concert of action. Plaintiff also responded to DLA's motion to dismiss the amended complaint by claiming the absolute litigation privilege did not apply to the Marrocco affidavit and Cooley declaration in the bankruptcy cause.

On January 3, 2007, the trial court granted DLA's motion. The trial court dismissed all of plaintiff 's claims except for abuse of process and tortious interference with prospective economic advantage pursuant to section 2-619 of the Code, finding that the absolute litigation privilege applied. The trial court also dismissed plaintiff's claims for abuse of process and tortious interference with prospective economic advantage pursuant to section 2-615 of the Code but granted plaintiff leave to amend those counts.

On March 7, 2007, the trial court denied plaintiff's motion to reconsider its January 3, 2007, order, but granted plaintiff's motion for leave to file a second amended complaint. The trial court, however, immediately dismissed with prejudice all of plaintiff's claims except for two new claims alleging concert of action and aiding and abetting.

DLA then filed a motion to dismiss those remaining two claims, arguing that they were "premised upon the procurement and filing" of the Marrocco affidavit and Cooley declaration. Plaintiff's approximate one-page

response conceded that, "without prejudice to his rights to appeal," these two claims must also be dismissed because of the absolute litigation privilege if the trial court would not "revisit" its prior dismissal order. On April 30, 2007, the trial court subsequently granted DLA's motion "[f]or the reasons set forth in the * * * January 3, 2007," order, and dismissed the second amended complaint with prejudice.

On June 19, 2007, defendants Missner, Choslovsky, DLA, Levin, Funkhouser, and Vance L. Liebman (as respondent in discovery), filed a petition for sanctions pursuant to Supreme Court Rule 137 (155 Ill. 2d R. 137), arguing that plaintiff's claim that Marrocco's affidavit was a forgery was not well grounded in fact and plaintiff failed to undertake a reasonable inquiry, which would have established the falsity of his forgery allegation.

On December 4, 2007, the trial court denied the petition. This appeal follows.

## ANALYSIS

### *The Attorney Litigation Privilege*

Plaintiff contends that the trial court erred in dismissing certain of his claims pursuant to section 2-619 of the Code, arguing that the attorney litigation privilege does not absolutely bar his claims for intentional defamation, negligent defamation, false light invasion of privacy, civil conspiracy, aiding and abetting, concert of action, as well as his claim for defamation

relating to alleged leaks of defamatory statements to the press. Specifically, plaintiff argues that the Marrocco affidavit and Cooley declaration were not valid court documents and were unrelated to the bankruptcy proceeding in which they were filed. Plaintiff further contends that Illinois should recognize some limitation to the attorney litigation privilege. In addition, plaintiff contends that the trial court erred in dismissing his claim for tortious interference with prospective economic advantage under section 2-615 of the Code, arguing that his second amended pleading cured any defect and the trial court's "cursory" dismissal was improper.

In a motion to dismiss brought under section 2-619, the movant may go beyond the allegations of the complaint and assert affirmative matters that would defeat the plaintiff's claim. 735 ILCS 5/2-619 (West 2004); *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Specifically, section 2-619(a)(9) of the Code of Civil Procedure permits involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2006). An affirmative matter in a section 2-619(a)(9) motion is something in the nature of a defense that completely negates the cause of action. *Van Meter*, 207 Ill. 2d at 367. Consequently, the moving party admits the legal sufficiency of the complaint, but asserts an affirmative

defense or some other matter to defeat the plaintiff's claim. *Van Meter*, 207 Ill. 2d at 367. In a defamation action, a claim of absolute privilege is an affirmative defense properly raised in a section 2-619 motion to dismiss. *Popp v. O'Neil*, 313 Ill. App. 3d 638, 642 (2000). When ruling on a section 2-619 motion to dismiss, a court must view the pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68.

A motion to dismiss brought pursuant to section 2-615 of the Code, however, challenges the legal sufficiency of a complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). As with a section 2-619 motion, in reviewing the sufficiency of a complaint, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts while viewing all allegations in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. As a result, a motion to dismiss pursuant to section 2-615 should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). Nonetheless, Illinois is a fact-pleading state, and conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted. *Time Savers, Inc. v. LaSalle Bank, NA.*, 371 Ill. App. 3d 759, 767 (2007). In addition, a pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient. *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 155 (1999), citing *Knox College v. Celotex Corp.*, 88 Ill. 2d

407, 423-27 (1981). Furthermore, absent the necessary allegations, even the general policy favoring the liberal construction of pleadings will not satisfy the requirement that a complaint set forth facts necessary for recovery under the theory asserted. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004).

We review *de novo* a dismissal pursuant to either section 2-619 or section 2-615 of the Code. See *Van Meter*, 207 Ill. 2d at 368 (section 2-619), *Young*, 213 Ill. 2d at 440 (section 2-615). Finally, we may affirm the judgment of the trial court on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct. *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 357 (2006).

"'An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications *preliminary* to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.'" (Emphasis in original) *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 832 (2006), quoting Restatement (Second) of Torts, § 586 (1977). The privilege affords complete immunity, irrespective of the attorney's knowledge of the statement's falsity or the attorney's motives in publishing the defamatory matter. *Popp*, 313 Ill. App. 3d at 642. The only requirement is that the communication pertain to proposed or pending litigation. *Atkinson*, 369 Ill. App. 3d at 834, *appeal denied*, 223 Ill. 2d 631 (2007). The pertinency

requirement is not applied strictly, and the privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation, with "[a]ll doubts * * * resolved in favor of a finding of pertinency." *Popp*, 313 Ill. App. 3d at 642. Moreover, upon submission to the clerk of the court, a document becomes a part of the public record. *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 702 (2000).

In this case, DLA's motion to enforce the automatic stay alleged that the arbitration proceeding was "tainted by serious procedural and substantive irregularities" including the fact that the arbitrator and plaintiff had an undisclosed and improper relationship. In support of its motion, DLA attached as exhibits the Marrocco affidavit and the Cooley declaration. The Marrocco affidavit alleged that Marrocco, while working as an FBI agent, intercepted statements by plaintiff that were of an "incriminating nature," and that when Marrocco confronted plaintiff with this information, plaintiff resigned from the attorney general's office. The Cooley declaration alleged that plaintiff and the arbitrator were involved in "fixing" criminal cases, including the murder trial of Harry Aleman. In essence, DLA sought to have the bankruptcy court adjudicate the arbitration matter concurrently with other claims because of an alleged undisclosed relationship between plaintiff and the arbitrator. DLA included the two documents alleging that both plaintiff and the arbitrator had a previous relationship that involved the fixing of criminal cases. By implication, DLA was alleging that plaintiff and the arbitrator were similarly fixing the arbitration. Given

that "[a]ll doubts should be resolved in favor of a finding of pertinency" (*Popp*, 313 Ill. App. 3d at 642), we find that the challenged statements were pertinent to the pending litigation, *i.e.*, the petition to have the bankruptcy court adjudicate the matter that had been in arbitration. The trial court, therefore, properly found the absolute litigation privilege to apply, and did not err in dismissing plaintiff's complaint.

Nonetheless, plaintiff contends that the Marrocco affidavit and Cooley declaration were not a "valid" part of the bankruptcy proceeding because they failed to meet the requirements of federal affidavits or declarations. In support of his contention, plaintiff relies upon *Kurczaba v. Pollock*, 318 Ill. App. 3d 686 (2000), and argues that *Sarelas v. Alexander*, 132 Ill. App. 2d 380 (1971), relied upon by defendants, is factually distinguishable from the case at bar. We disagree.

In *Kurczaba*, the defendant represented individuals in a class action lawsuit against a travel agency of which one of the plaintiffs was a principal. *Kurczaba*, 318 Ill. App. 3d at 690. Prior to being granted leave to file an amended complaint, the defendant distributed the amended complaint as well as an advertisement for that plaintiff's law firm, which included his photograph. *Kurczaba*, 318 Ill. App. 3d at 691. The plaintiffs sued the defendant, alleging defamation and various other causes of action. *Kurczaba*, 318 Ill. App. 3d at 691. The trial court subsequently granted the defendants a motion to dismiss. *Kurczaba*, 318 Ill. App. 3d at 692. On appeal, the defendant claimed the attorney litigation

privilege applies regardless of whether the trial court would grant leave to file the complaint, because "once it was accepted by the circuit court, it became a part of the public record." *Kurczaba*, 318 Ill. App. 3d at 701. This court rejected the defendant's claim, noting that amendments filed without leave of court are a nullity, and therefore the defendant's amended complaint was "not yet part of a judicial proceeding." *Kurczaba*, 318 Ill. App. 3d at 702-03.

Here, the Marrocco affidavit and Cooley declaration were not disseminated to third parties. Rather, they were filed with the bankruptcy court. Moreover, defendants were not obligated to first obtain leave of the bankruptcy court prior to filing the affidavit and declaration in support of its motion to enforce the automatic stay. Therefore, those documents were not a "nullity"; they were part of a judicial proceeding. *Kurczaba* is therefore unavailing.

In *Sarelas*, the plaintiff appealed from the dismissal of his complaint for libel after the defendant "prepared and placed" a document with the trial court. *Sarelas*, 312 Ill. App. 2d at 382. The plaintiff claimed that the document, captioned as an affidavit, was not signed and dated, and was missing a jurat. *Sarelas*, 312 Ill. App. 2d at 384. This court, however, rejected the plaintiff's claim, holding that the "failure of the document to meet certain formal requirements of an affidavit did not deprive it of its privileged status." *Sarelas*, 312 Ill. App. 2d at 384.

Here, as in *Sarelas*, plaintiff is contending that the Marrocco affidavit and Cooley declarations failed to meet certain formal requirements, *i.e.*, they were not notarized, they did not meet the legal requirements for declarations "as required by 28 U.S.C. § 1746," and that the Marrocco affidavit was erroneously captioned. We find that *Sarelas* is not factually distinguishable from the case at bar, and that its holding is controlling in this case, as well.

Next, plaintiff argues that, even if the absolute litigation privilege applies, this court should nonetheless limit the application of it to this case because defendants' actions were "beyond the pale" of what may be deemed privileged conduct and contrary to the holding in *Parker v. Kirkland*, 298 Ill. App. 340 (1939), which according to plaintiff, required good faith prior to enforcing the privilege. We disagree. The affidavit and declaration were not "beyond the pale"; they merely memorialized the statements of two individuals that tended to support defendants' claim that the arbitrator and plaintiff's undisclosed relationship tainted the arbitration proceedings. Furthermore, the court in *Parker* did not require good faith in filing an allegedly defamatory document for the absolute litigation privilege to apply. Rather, this 70 year old appellate court case held that anything "pertinent and material" to the cause of action is privileged, and quoted an even older supreme court case affirming the dismissal of a count in slander, based upon an allegedly libelous affidavit that was filed in a legal proceeding, *Parker v. Kirkland*, 298 Ill. App. at 346-47, quoting *Spaids v. Barrett*, 57 Ill. 289, 291 (1870)

("'Whatever is said or written in such proceeding, pertinent and material to the matter in controversy, is privileged, and no action can be maintained upon it.'"); accord *Blair v. Walker*, 62 Ill. 2d 1, 5-6 (1974) ("Where the privilege is absolute, it cannot be overcome by a showing of improper motivation or knowledge of falsity."), *Zych v. Tucker*, 363 Ill. App. 3d 831, 834 (2006) ("An absolute privilege provides a complete immunity from civil action even though the statements were made with malice"). We therefore find no reason under the facts of this case to limit the absolute litigation privilege.

Accordingly, we must reject plaintiff's contention that the trial court erred in dismissing his claims for intentional and negligent defamation, false light invasion of privacy, civil conspiracy, aiding and abetting, and concert of action under section 2-619 based upon the absolute litigation privilege.

Regarding plaintiff's claim for defamation relating to alleged leaks of defamatory statements to the press, plaintiff argues that, even if the Marrocco affidavit and Cooley declaration are subject to the absolute litigation privilege, that privilege does not apply to its claim related to alleged leaks to third parties (here, the news media). As noted above, however; documents filed with the court are a part of the public record (see *Kurczaba*, 318 Ill. App. 3d at 702). The record in this case reveals that DLA's motion to enforce the automatic stay (which referenced the Marrocco affidavit and Cooley declaration as exhibits and summarized their contents)

was filed three days prior to a newspaper article reporting the statements and referring to the republished citing. As such, we are at a loss as to how, as plaintiff argues, "only the defendants knew that the statements were filed in the bankruptcy," and therefore were the only individuals who could have provided the statements to the press. Because plaintiff's allegation was merely a conclusory factual allegation unsupported by specific facts, it may not be deemed admitted (*Time Savers*, 371 Ill. App. 3d at 767), and the trial court did not err in dismissing this claim.

Furthermore, plaintiff's citation to *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 165 (1998), does not persuade us to hold otherwise. *Lykowski* held that the plaintiff's claim that the defendant leaked unspecified defamatory statements to "'the newspapers' and * * * [the] plaintiff's employer'" rendered the complaint factually deficient. *Lykowski*, 299 Ill. App. 3d at 164. Here, plaintiff merely alleged that certain unnamed "defendants" leaked the publicly-filed affidavits to "the press, including the Chicago Sun-Times." Defamation claims must be pled with specificity (see *Krueger v. Lewis*, 342 Ill. App. 3d 467, 470-71(2003), citing *Lykowski*, 299 Ill. App. 3d at 163). Plaintiff's allegations here fail to meet that requirement. As a result, the trial court properly dismissed this claim, and defendant's contention must fail.

Plaintiff's final contention on appeal is that the trial court erred in dismissing his claim for tortious interference with prospective economic advantage

because his second amended complaint cured the pleading deficiencies cited by the trial court, namely, that plaintiff failed to allege purposeful interference and facts to establish either the breach of an existing business relationship or the loss of reasonably certain future business.

One of the elements of the tort of intentional interference with a business expectancy is "the defendant's intentional and *unjustified* interference that prevents the realization of the business expectancy." (Emphasis added.) *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 862 (2008). In other words, a defendant's interference must be improper. See Restatement (Second) of Torts, § 766B, Comment a, at 20 (1979). Because we have already held that the filing of the Marrocco affidavit and Cooley declaration were protected under the absolute litigation privilege, whatever interference may have occurred between plaintiff and his prospective economic advantages was not improper. Therefore, plaintiff's claim must fail.

Plaintiff, however, argues in his reply brief that the trial court's dismissal order does not indicate that the claim was dismissed based upon the absolute litigation privilege and implies that it was dismissed because it was improperly pled. As noted above, however, we may affirm the judgment of the trial court on any basis in the record, regardless of whether the trial court relied upon that basis or whether the trial court's reasoning was correct. *Rodriguez*, 218 Ill. 2d at 357. Accordingly,

regardless of the trial court's reasoning, we affirm the judgment of the trial court dismissing plaintiff's claim for tortious interference with prospective economic advantage, and plaintiff's final contention on appeal is unavailing.

*Defendants' Cross-Appeal of the Denial of Its Petition for Sanctions*

Finally, defendants appeal the trial court's denial of its petition for sanctions based upon plaintiff's "bombshell allegation" that DLA had forged Marrocco's name to his affidavit and knowingly filed the forged affidavit in the federal bankruptcy court.

Supreme Court Rule 137 (155 Ill. 2d R. 137) provides in pertinent part that:

> "Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. * * * The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable. inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to

> cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

The challenged conduct must be assessed by an objective standard; subjective good faith is not sufficient. *Technology Innovation Center, Inc. v. Advanced Multiuser Technologies Corp.*, 315 Ill. App. 3d 238, 244 (2000).

Because Rule 137 is penal in nature, it must therefore be strictly construed, with each element of a violation specifically proved. *Technology Innovation Center*, 315 Ill. *App.* 3d at 244, citing *Estate of J.M.*, 287 Ill. App. 3d at 116. In addition, Rule 137 sanctions should only be imposed for the "most egregious" of cases. *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1197 (2003). Even if a party has failed to party for failing to conduct an investigation of facts and law before filing and those arguments are unpersuasive or incorrect, sanctions are improper if the party presents objectively reasonable arguments for its position. *Barrett*, 343 M. App. 3d at 1199.

*Appendix B*

We will not disturb the trial court's decision on a motion for sanctions under Rule 137 absent an abuse of discretion. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998). A trial court abuses its discretion when its factual findings are against the manifest weight of the evidence (*Technology Innovation Center*, 315 Ill. App. 3d at 244, citing *In re Estate of J.M.*, 287 Ill. App. 3d 110, 115 (1997)), or if no reasonable person would take the view adopted by it (*Technology Innovation Center*, 315 Ill. App. 3d at 244). Our primary consideration is whether the trial court's decision was informed, based on valid reasoning, and follows logically from the facts. *Technology Innovation Center*, 315 Ill. App. 3d at 244.

The cornerstone of defendants' contention centers on plaintiff's allegation that one or more of the defendants forged Marrocco's affidavit. In this case, Polales, plaintiff's law partner, stated that Marrocco denied signing the affidavit that had been filed under his name in federal court. This, in essence, formed the basis for plaintiff's forgery allegation. Plaintiff served his request for the "original" of Marrocco's affidavit on December 2, 2005, but filed his amended complaint four days later, on December 6, 2005, in order to comply with the deadline set by the trial court. The trial court ordered Marrocco's deposition, at which time, Marrocco stated that he did sign that affidavit and claimed that he did not deny signing the affidavit. Rather, Marrocco claimed that he told Polales that he could not definitively say whether he signed the affidavit because he did not recognize one portion of the document. Two months, after Marrocco's deposition, plaintiff abandoned any

claim of forgery on the part of defendants. Admittedly, plaintiff made a very serious allegation against officers of the court. Plaintiff presented an objectively reasonable argument for including this allegation, and therefore the fact that this allegation was later found to be untrue and that plaintiff's investigation was not exhaustive would not warrant sanctions. Therefore, the trial court's decision was "informed, based on valid reasoning, and follow[ed] logically from the facts." *Technology Innovation Center*, 315 Ill. App. 3d at 244. Accordingly, no abuse of discretion occurred, and defendants' contention on this issue must fail.

Defendants, however, also argue that plaintiff's failure to have his attorney sign his verified complaint, his failure to properly plead defamation with respect to alleged leaks to the press or to name certain parties as defendants provide additional support for their claim. Defendants also point to the fact that the federal district court had imposed sanctions on plaintiff for what it believed was "apparent gamesmanship." Defendants' arguments, however, are unavailing.

Plaintiff's conduct before the federal court, however, was resolved in that forum when the federal court imposed sanctions on plaintiff, and we believe that it would be unduly harsh to penalize plaintiff twice. Finally, plaintiff's pleadings, albeit defective, were not so egregious as to merit sanctions under Rule 137. Therefore, the trial court properly denied defendants' petition for sanctions.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.

O'MALLEY, P.J., with JOSEPH GORDON and CAHILL, JJ., concurring.

## APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, LAW DIVISION DATED DECEMBER 4, 2007

**IN THE CIRCUIT COURT OF COOK COUNTY**
**COUNTY DEPARTMENT, LAW DIVISION**

**No. 05 L 8474**

MICHAEL A. FICARO, INDIVIDUALLY,

**Plaintiff,**

v.

NICHOLAS BETZOLD, JR., INDIVIDUALLY, LARRY LEVIN, INDIVIDUALLY AND AS AGENT AND EMPLOYEE OF FUNKHOUSER, VERGOSEN, LIEBMAN & DUNN, LTD., F/K/A/ LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, INDIVIDUALLY AND AS AGENT AND EMPLOYEE OF DLA PIPER, RUDNICK, GRAY CARY, U.S. L.L.P. F/K/A PIPER RUDNICK, L.L.P., WILLIAM CHOSLOVSKY, INDIVIDUALLY AND AS AGENT AND EMPLOYEE OF DLA PIPER, RUDNICK, GRAY CARY, U.S. L.L.P. F/K/A PIPER RUDNICK, L.L.P.,

**Defendants.**

### MEMORANDUM OPINION AND ORDER

This cause coming to be heard on motion of the defendants, David Missner, and William Choslovsky, Individually and DLA Piper, Rudnick, Gray Cary, U.S. L.L.P., defendants Larry Levin and Funkhouser,

Vergosen, Liebman & Dunn, Ltd., f/k/a/ Levin & Funkhouser, Ltd., and Vance L. Liebman, Respondent in Discovery, for sanctions pursuant to Supreme Court Rule 137.[1] The court, after reviewing the motion and replies, and upon examining the record, court file and case law, states as follows:

**UNDERLYING FACTS:**

Plaintiff, Michael Ficaro, is an attorney who represented certain minority shareholders of The Betzold Companies in a successful contract dispute against Nicholas Betzold, Jr. After Ficaro's clients obtained an arbitration award against Betzold, he filed for bankruptcy in the U.S. District Court, Northern District of Illinois. Betzold also pursued an order in the federal bankruptcy action designed to set aside the unfavorable arbitration finding. [Amended Complaint, ¶ 29-30; 63-66] To advance his motion to stay/set aside the arbitration award, Betzold filed affidavits from one Francis N. Marrocco, an ex-FBI agent and Robert J. Cooley, an ex-attorney. [Exhibits A, B, Plaintiff's Verified Amended Complaint] Only the Marrocco affidavit is in issue in this litigation.

Betzold's motion to stay was predicated upon an alleged collusion between the arbitration hearing officer and the plaintiff. [Motion to Enforce The Automatic Stay,

1. All individual and corporate defendants, including Respondents in Discovery, are collectively referred to as "Defendants".

*Appendix C*

*In re: Nicholas William Betzold, Jr.*; No 04 B 28474 (U.S.B.C., ND Ill. E.Div.), ¶35-43; Amended Complaint, ¶10, 44, 90-91] and the affidavits were proffered as evidence of this alleged collusion. There was no determination as to the accuracy of the affidavits[2] or whether they were considered in the motion to stay. Both documents were withdrawn by Betzold before the substantive issues were presented to the bankruptcy judge. [See: Minute Order: *In re: Nicholas William Betzold, Jr.*; No 04 B 28474 (U.S.B.C., ND Ill. E.Div.) October 14, 2004, Hon. John D. Schwartz]

The present case evolved from the bankruptcy proceeding and focused upon the actions of the attorneys in that action. Plaintiff Ficaro alleges Betzold and his attorneys [collectively, the defendants][3] procured and filed two defamatory affidavits in conjunction with the bankruptcy action. [Amended Complaint, 86-91] It is further alleged that the affidavits were not connected to any issue pending before the

2. Report of Proceeding, *In re: Nicholas William Betzold, Jr.*; No 04 B 28474 (U.S.B.C., ND Ill.E.Div.) October 14, 2004, Hon. John D. Schwartz, ¶4-6.

3. The Amended Complaint at issue identifies defendant Larry Levin as an attorney who was a board member, employee and legal advisor to The Betzold Companies. Mr. Levin was employed by Funkhouser, Vegosen, Liebman & Dunn, Ltd., named as co-defendants. The Respondent in Discovery, Vance L. Liebman, is also an employee of this law firm. It is alleged that, as an employee, Mr. Liebman possessed information as to the determination of additional defendants. [Amended Complaint, Count X-XVIII]

bankruptcy court [Amended Complaint, ¶93-95] and the substance of these affidavits were published to individuals not associated with the bankruptcy litigation [Amended Complaint, ¶ 67-70] as well as the press [Amended Complaint, ¶123-125].

Plaintiff initially sought to prosecute an action for Negligent False Light/Invasion of Privacy [Count V] Malicious Prosecution [Count VI]; RICO [Count VII] and all claims relating to Respondents in Discovery. These claims were later abandoned. Plaintiff's last pleading was predicated upon theories of Abuse of Process [Count I]; Intentional and Negligent Defamation [Counts II, III]; Intentional False Light/ Invasion of Privacy [Count IV] and Civil Conspiracy [Count VIII] and Tortuous Interference With Prospective Economic Advantage [Count IX]. These claims were dismissed by this court on January 3, 2007 and April 30, 2007.

With the dismissal of plaintiff's action, the defendants have sought sanctions under Supreme Court Rule 137. The specific issue under Rule 137 scrutiny are allegations by the plaintiff that the Marrocco affidavit proffered by Betzold in the federal litigation was forged, and this forgery was either procured by defendant or collectively, the defendant, the attorneys and the respondent in discovery. The issue of the forged affidavit was introduced into the litigation by plaintiff on December 6, 2005 with plaintiff's Amended Verified Complaint. [Amended Complaint, ¶81- 84]. The forgery issue was vigorously litigated by the parties until

November 14, 2006 when the claim was abandoned. [See Plaintiff's Response to DLA Piper's Motion to Dismiss, 11/14/06; pg. 3] Defendants claim that the forgery issue was initiated by plaintiff and his attorney in bad faith, as an attempt circumvent defendant's claim of absolute privilege.

**SUPREME COURT RULE 137**

Defendants' motion for sanction is based on plaintiff's alleged failure to investigate the authenticity of the affidavit before portraying it as a forgery in the amended complaint. Defendants further argue that the allegations of the Amended Complaint ( and specifically, the allegations of forgery) accused them of misconduct. These incriminations were aimed at the integrity of defendant attorney's representation of Betzold, even though plaintiff did not prosecute the issue before a disciplinary commission.

An action under 137 is predicated on the alleged falsity of the pleadings, and the inquiry is so limited in scope. Initially, Rule 137 states, in relevant part, as follows:

**Rule 137. Signing of Pleadings, Motions and Other Papers — Sanctions**

> Every *pleading, motion and other paper of a party* represented by an attorney shall be signed by at least one attorney of record

in his individual name, whose address shall be stated . . .

. . . . The signature of an attorney or party constitutes a certificate by him that he has read *the pleading, motion or other paper;* that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument *for the extension, modification, or reversal of existing law. . . .*

. . . . *If a pleading, motion or other paper is signed* in violation of this rule, the court, upon motion or it's own initiative, may impose upon the person who signed it.,..an appropriate sanction.

Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

[Emphasis supplied]

Supreme Court Rule 137 requires litigants and their attorneys to conduct a reasonable inquiry into the facts and the law before filing a pleading, and to certify that the pleading is well founded in both fact and law. *Keller v. Roberts*, 276 Ill. App. 3d 164, 658 N.E. 2d 496 (1995). Failure to comply with this mandate may subject the

litigant, litigant's attorney, or both to court ordered sanctions which may include payment of the other party's attorney fees and costs. The inquiry must be completed with respect to each allegation within a pleading, as well as each denial. The "reasonableness" of an inquiry is measured against an objective standard looking to the circumstances existing at the time the pleading or legal paper was submitted to the court. That the signing party "honestly believed" the case was well grounded in fact or law is insufficient to meet the obligation imposed by Rule 137. *Walsh v. Capital Eng'g & Mfg. Co.*, 312 Ill. App. 3d 910; 728 N.E.2d 575 (2000); *Century Nat'l Ins. Co. v. Tracy*, 316 Ill. App. 3d 639; 737 N.E.2d 353 (2000).

Plaintiffs assert that they did conduct an inquiry into the Marrocco affidavit. The record contains a detailed affidavit by attorney Dean Polales which delineates his meetings with Mr. Marrocco and the facts elicited from these meetings. Mr. Polaris met with Mr. Marrocco in July 2005 to discuss the case, and specifically the veracity of the affidavit. A second meeting took place on August 1, 2005, at Marrocco's attorney's office.

According to Mr. Polales, Mr. Marrocco stated that, in June 2004, he spoke to an attorney identified as Larry Levin. Mr. Levin questioned Mr. Marrocco about facts which were unfavorable to either plaintiff or Thomas Heft, the arbitrator who rendered the unfavorable decision against Mr. Betzold.. Marrocco conversed with Mr. Levin, who condensed the conversation into a written

statement and sent it to Marrocco for his review. In a subsequent phone conversation, Levin asked Marrocco to sign the statement, but Marrocco declined, because it was inaccurate. [Affidavit of Dean Polales, July 17, 2007, ¶18-24]

According to Mr. Polales, when he showed Marrocco the June 2004 federal court affidavit, Marrocco stated that he did not sign the document. Marrocco further denied preparing the affidavit and stated that, shortly after his interview with Levin, he instructed his attorney to inform Mr. Levin that he was withdrawing his cooperation..[Affidavit of Dean Polales, July 17, 2007, ¶26-29; Deposition of Francis Marrocco, September 13, 2007 , p.100-101] Mr. Marrocco also refused to sign any statements confirming his discussion with Polales. [Affidavit of Dean Polales, July 17, 2007, ¶33-34; Deposition of Francis Marrocco, September 13, 2007 , p.100-101] Mr. Polales reiterated this information, and specifically, Marrocco's repudiation, to plaintiff and counsel prior to December 2005. The amended pleadings, filed on December 6, 2005 were based on Marrocco's refutation of his signature on the June 2004 document.

Francis Marrocco's deposition was also taken in conjunction with this issue. Mr. Marrocco admitted to signing a "statement" [Deposition of Francis Morocco, September 13, 2007, p. 45-50, 51-57] but at the time of signing, did not recognize the "statement" as a court document or an affidavit [Deposition of Francis Morocco, September 13, 2007, p. 50, 55-67]. The "statement" that

bears his signature was delivered to his home by Mr. Levin. [Deposition of Francis Morocco, September 13, 2007, p. 61-62] Consistent with Mr. Polalis' recitation, Marrocco testified that he instructed his attorney to contact Mr. Levin and withdraw his cooperation in the case. [Deposition of Francis Morocco, September 13, 2007, p.65-66] He never heard from Mr. Levin, after that point. [Deposition of Francis Morocco, September 13, 2007 , p.66-67] Further, he admitted to telling Mr. Polales that the signature on the June 2004 affidavit did not appear to be his, and that he did not recall signing that specific document. [Deposition of Francis Morocco, September 13, 2007, p.100-101] At his deposition, however, he acknowledged the authenticity of his signature on the June 2004 affidavit. [Deposition of Francis Morocco, September 13, 2007, p.80-81]

The stated purpose of Rule 137 is to penalize litigants who plead frivolous or false matters or bring suit without any basis in law. See: *Wallace v. Woolfolk*, 312 Ill. App. 3d 1178; 728 N.E.2d 816; (2000) *Spiegel v. Hollywood Towers Condominium Ass'n*, 283 Ill. App. 3d 992, 1001, 671 N.E.2d 350, 358, (1996). It is not sufficient that the facts are ultimately adverse to the pleadings as set forth in the trial court; the moving party must show that the party against whom sanctions are sought knew or should have known that the statements were untrue. *Ruddock v. First Nat'l Bank*, 201 Ill. App. 3d 907, 559 N.E.2d 483 (1990). If, after suit, it becomes evident that the factual foundation of the action is in error, an attorney is duty bound to promptly dismiss a lawsuit:

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> "Because an attorney's first duty is to the administration of justice, he is obligated to dismiss a claim which is ultimately revealed to be unfounded in its entirety, even over objections from his client. . . . once it appears that the prior factual allegation is in error, this must be brought forthrightly to the attention of court and opposing counsel, at the least in the next available court filing."

*Walsh v. Capital Eng'g & Mfg. Co.*, 312 Ill. App. 3d at 918-919.[4] [Emphasis supplied].

Here, the amended pleading was filed in December 2005 based on information garnered by Mr. Polales and reported to Plaintiff's counsel. Polales' affidavit and the facts stated therein is supported by the deposition testimony of Francis Marrocco. Simply, Marrocco repudiated his signature on the June 2004 affidavit to Polalis, and later, in deposition testimony, recanted. The issue of the authenticity of the affidavit was only resolved after Marrocco's deposition, in September 2006. The allegations of forgery were withdrawn 60 days later. Plaintiff did not continue to prosecute the matter, but timely abandoned the claim.

4. See also: *Nissenson v. Bradley*, 316 Ill. App. 3d 1035; 738 N.E.2d 586; (2000) [an attorney who failed to advise counsel that a false medical record was tendered to the court was properly sanctioned under Rule 137.]; *In Re Marriage of Schneider*, 298 Ill. App. 3d 103, 697 N.E.2d 1161, (1998) [finding no indication of pre-filing investigation]

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There is nothing casual about the allegations leveled by the plaintiff against the defendant and his attorneys. Further, the intensity of the investigation, as well as the direction pursued by all parties could only have resulted dishonor to court and counsel, whether proven or not. This is not an instance where the allegations, if unproven, create no harm; professional reputations and personal integrity have been called into question. "A reputation once broken may possibly be repaired, but the world will always keep their eyes on the spot where the crack was."[5] Mere inquiry into one's integrity creates speculation as to the need.

This court acknowledges the severity of these circumstances. The remedy sought, sanction under the Supreme Court Rules, requires a finding that the allegations were brought without a factual basis. Defendants urge that finding; the record states otherwise. However imprudent the allegations prove, they were not imagined or invented; both sides relied upon the veracity of Marrocco . The amended pleading under scrutiny was based on information gathered from a source whose reliability was confirmed by a witness's deposition. The circumstances surrounding this litigation, however extreme, are not sanctionable under Illinois law.

5. Anglican Bishop Joseph Hall, 1574-1656.

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Wherefore, for the aforementioned reasons,

It is hereby ordered:

David Missner, and William Choslovsky, Individually and DLA Piper, Rudnick, Gray Cary, U.S. L.L.P., defendants Larry Levin and Funkhouser, Vergosen, Liebman & Dunn, Ltd., f/k/a Levin & Funkhouser, Ltd., and Vance L. Liebman, Respondent in Discovery, Motion for Sanctions Pursuant to Rule 137 is respectfully denied.

Entered: Judge Susan Zwick
DEC 04 2007
Date: CIRCUIT COURT - 1617

## APPENDIX D — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, LAW DIVISION ENTERED NOVEMBER 28, 2007

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – LAW DIVISION**

No. 06 L 12632

DAVID MISSNER and WILLIAM CHOSLOVSKY

Plaintiffs,

v.

ROBERT CLIFFORD

Defendant.

**ORDER**

1) Defendant Robert Clifford moves for summary judgment pursuant to 735 ILCS 5/2-1005. For the following reasons, defendant's motion is denied.

2) Defendant moves to dismiss pursuant to 735 ILCS 5/2-619.1. As discussed below, defendant's motion is improper under Section 2-619.1 and will be considered by the Court as a motion for summary judgment. For the following reasons, defendant is granted summary judgment.

*Appendix D*

## FACTS

On December 4, 2006, plaintiffs David Missner and William Choslovsky, who are attorneys practicing bankruptcy law, filed their complaint alleging defendant, also an attorney, defamed them on December 8, 2005. Subsequently, William Choslovsky retained a separate law firm and filed a separate Amended Complaint on May 15, 2007. On June 22, 2007, Mr. Choslovsky voluntarily dismissed his Amended Complaint. Currently, only David Missner's claims in the original complaint remain pending.

David Missner alleges defendant's defamation stems from an affidavit of an ex-FBI agent, which defendant stated was forged in order to extort a settlement for one of defendants' clients. In June 2004, plaintiff was retained to represent Nicholas Betzold in a Chapter 11 bankruptcy case. Prior to this, Mr. Bezold had been represented by the law firm of Kirkland & Ellis in an arbitration proceeding involving three minority shareholders of Mr. Bezold's financial service company.

During the bankruptcy proceeding, plaintiff alleges he filed a motion to enjoin the arbitration proceedings and attached the affidavit of Francis Marrocco, a retired FBI agent, in support of the motion. The affidavit was procured by an attorney at Kirkland & Ellis and was not prepared by plaintiff. Plaintiff asserts he used the affidavit to argue that the arbitrator was an attorney for one of the minority shareholders, Michael Ficaro, had a "common association" and a relationship that was

not disclosed in the arbitration. Later, in 2005, defendant's law firm filed a defamation lawsuit on Mr. Ficaro's behalf in Cook County. After the suit was filed, plaintiff alleges defendant made the following statements, which were published in the Chicago Tribune and Chicago Daily Law Bulletin:

- Plaintiff forged the signature of an ex-FBI agent and created a false affidavit.

- Plaintiff made intentional false statements in an attempt to "improperly influence the outcome of some vigorously contested corporate litigation . . ."

- Plaintiff created the affidavit "to try to pressure Ficaro to settle a lawsuit in which his clients were seeking $15 million from . . . Nicholas Bezold . . ."

- Plaintiff "intended to extort Ficaro and his law firm into settling . . ." the lawsuit by using the Marrocco affidavit.

Plaintiff denies these statements are true and allege defendant made the statements in reckless disregard of their truth or falsity. Plaintiff alleges these statements were defamation *per se*.

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Defendant stated the following in his affidavit:

- He did not personally have any discussions or communications with any newspaper representatives regarding the statements alleged in plaintiffs' compiaint or the allegations in Mr. Ficaro's Verified Amended Complaint filed on December 6, 2005.

- Between December 3, 2005 and December 9, 2005, he was in Monterey, California and did not have any oral, e-mail, or fax communications with his office regarding the statements alleged by plaintiffs.

- He did not see, read, receive, or have read to him the draft press release or press release sent to the Chicago Tribune. He did not have any discussion or input concerning the wording of the press release prior to its disclosure to the Chicago Tribune.

- He did not see the Press Release until after this case was filed on December 4, 2006.

Defendant testified at deposition as follows:

- He is the sole shareholder of Clifford Law Offices, P.C. (Clifford Dep., 4-5).

- He hired Ms. Menaker about 15 years ago. She is a lawyer who has been educated in journalism.

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Her principal function is to assist him with media relations and marketing the law firm. (6).

- Ms. Menaker takes his calls from the media, finds out what they want, what their deadline is, and tells him about it. (7-8).

- He does not believe Ms. Menaker has spoken for him on a specific topic. (8).

- Ms. Menaker is not asked for a comment from the firm. They always want a comment from him personally. (9).

- She does not independently serve as a spokesperson for the firm. (9).

- Press releases are sent out on an event-related basis, for example in response to an investigation or settlement. (10).

- He has the authority to stop a pleading from being filed by his firm. (13).

- He was aware a claim would be filed pertaining to the Marrocco affidavit. (16).

- Ms. Menaker is a direct agent of Clifford Law Offices. (20).

- Both he and Ms. Menaker are agents and employees of the firm. (20).

*Appendix D*

- Ms. Menaker sent the press release to the Tribune. (21).

- The statement was sent as a statement by Robert Clifford. Ms. Menaker sent the statement and had the authority to do so. (22).

- He did not tell anyone that the statement should not have been issued. (23).

- Ms. Menaker had the authority of Clifford Law Offices to issue the statement. She never spoke to him about obtaining his personal authority. (24).

- Ms. Menaker had the authority to issue the statement in form it was sent. (26, 27).

- He was involved in meetings regarding the Marrocco affidavit prior to filing the verified amended complaint. (31).

- He had authority to withdraw a pleading filed with his name on it. (36-37).

- The media knows Ms. Menaker is the media relations and communications partner. (41-42). He has not held her out as someone who can speak for his firm on issues involving cases the media is interested in. (42).

- His understanding of the media is that they would not accept a response from anyone without being explicitly told that they are speaking with authority. (43).

Pamela Menaker stated the following in her affidavit:

- She is an attorney and employee of Clifford Law Offices, P.C.

- She was involved in preparing a press release regarding the filing of the amended Ficaro complaint on December 6, 2005.

- She received a draft of the press release from the offices of Ungaretti & Harris on December 6, 2005. She discussed it with Mr. Ficaro and Richard Burke, Jr. of Clifford Law Offices. They agreed to make minor edits to the press release and then forwarded it to the Chicago Tribune.

- She does not have a record of sending it to the Chicago Daily Law Bulletin.

- Mr. Clifford was out of town and unavailable on December 6, 2005. She did not forward the draft or final version of the press release to him. Also, she did not speak to Mr. Clifford about the press release until after suit was filed against him.

*Appendix D*

Ms. Menaker testified at deposition as follows:

- From 2000 to the present, she spent 90-95% of her time on media relations. (Menaker Dep., 8-9).

- She and a combination of people drafted the statement. (10).

- She did not attempt to reach Mr. Clifford before issuing the statement because he was on vacation and told her not to call him about anything. (10-11).

- She has the firm's authority to issue a "Statement of Robert Clifford." (11, 12).

- The statement was issued from Mr. Clifford and Clifford Law Offices because the media requires a statement from a person. (11).

- Press releases or statements are issued an estimate 30 to 60 times per year. (12).

- She got her information from the complaint, the amended complaint, and Richard Burke, a partner. (13).

- When she issues statements, they say "Statement of Robert Clifford." (15).

- A copy of the amended complaint was sent with the statement. It is the Tribune's policy to have a file-stamped copy of any pleading before doing a story. (19-20).

- She also forwarded the statement to Mr. Ficaro and Richard Burke. (24-25).

## DECISION

*Defendant's Motion for Summary Judgment*

Defendant argues summary judgment should be granted because there is no question that he did not publish or cause to be published the alleged defamatory statements. "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Solaia Technology, LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558, 579 (2006). "In general, 'all persons who cause or participate in the publication of libelous or slanderous matters are responsible for such publication.'" *Van Horne v. Muller*, 185 Ill. 2d 299, 308 (1998) (quoting 33A Ill. L. & Prac. *Slander and Libel* § 83, 89 (1970)). Summary judgment is appropriate where a plaintiff has "failed to submit any evidence that [the defendants] caused dissemination of [the defamatory] information . . ." *Walsh v. City of Chicago*, 712 F. Supp. 1303, 1311 (N.D. Ill. 1989). Here, defendant asserts there is no evidence that he caused or participated in the publication

of a statement about them based on his affidavit and the affidavit of Ms. Menaker.

In response, plaintiff David Missner argues defendant caused the publication of the press statement though his agent, Ms. Menaker. Plaintiff asserts defendant acquiesced to the procedure of statements sent out in his name by allowing it to occur 30 to 60 times per year and authorizing Ms. Menaker to issue statements. Further, plaintiff cites to defendant's testimony that "unquestionably" the statement was by Robert Clifford, that Ms. Menaker did it, and that Ms. Menaker had the authority to do so. "When the facts relied upon to establish the existence of an agency relationship are conflicting, or conflicting inferences can be drawn from them, the question is one of fact for the jury . . ." *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 559 (1st Dist. 2005). Plaintiff contends there is a question of fact as to Ms. Menaker's authority to issue statements in defendant's name.

Next, plaintiff asserts *Solaia Technology is* distinguishable because it did not involve a dispute as to publication. Further, *Van Horne* and *Walsh*, also cited by defendant, do not support summary judgment as there is a question of fact as to whether defendant caused the publication to occur, plaintiff argues.

In reply, defendant reiterates that he did not personally compose or see any statements regarding plaintiff. By focusing in Ms. Menaker's activities, defendant argues plaintiff has conceded that the

allegations in the complaint are false and therefore summary judgment on the pleadings is proper. "If the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory." *Pagano v. Occidental Chem. Corp.*, 257 Ill. App. 3d 905, 911 (1st Dist. 1994). Defendant contends plaintiff's new, and unpled, theory of liability regarding Ms. Menaker's agency status is not sufficient to avoid summary judgment. "A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996).

Next, defendant argues there is no factual support that Ms. Menaker was his actual agent; rather, both were co-agents of their employer, Clifford Law Offices, a non-party. "'The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal.'" *Oliveira-Brooks v. Re/Max Intl., Inc.*, 372 Ill. App. 3d 127,134 (1st Dist. 2007) (quoting *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 444 (1st Dist. 1992)). Based on the above testimony, defendant asserts he and Ms. Menaker were merely co-employees and co-agents of the law firm, and Ms. Menaker did not have authority to issue statements on his personal behalf. "Coagents have agency relationships with the same principal." *Restatement (Third) of Agency* § 1.04 (2006). "A superior coagent has the right, conferred by the

principal, to direct a subordinate coagent." *Id.* "In a relationship of coagency, neither agent is the other's agent . . . [and] neither is vicariously liable for wrongs committed by the other." *Id.* at Comment *a.* Defendant points out plaintiff has not named Clifford Law Offices as a defendant and may not do so now after the one-year statute of limitations has expired. Defendant contends the testimony is consistent with a coagency relationship between him and Ms. Menaker.

Additionally, defendant argues the fact that the press statements issued by Ms. Menaker were titled with his name is not circumstantial evidence of an actual agency relationship. "[C]ircumstantial facts must be of such a nature and so related as to make the conclusion reached the more probable, as opposed to possible, one." *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 398 (1st Dist. 2000). While it may be possible to infer an undisclosed personal agency relationship from the statements, defendant contends it is more probable that a coagency relationship exists based on the testimony. Further, defendant asserts there is no apparent agency as a matter of law because plaintiff cannot prove the elements required for a finding of agency between him and Ms. Menaker.

The Court finds there is no basis for summary judgment. It is clear from the evidence that defendant authorized Ms. Menaker to make statements in his name and was aware Ms. Menaker was contacted by members of the media. Further, Ms. Menaker, Mr. Ficaro, and Richard Burke drafted the statement without

defendant's input but with his imprimatur. Despite defendant's testimony that Ms. Menaker has not spoken for him on a specific topic, the evidence indicates the procedure here is one that defendant was fully aware of and approved. A jury may reasonably conclude from these facts that Ms. Menaker was defendant's agent for the purpose of issuing press statements in defendant's name.

Defendant has also cited to Section 1.04 of the *Restatement (Third) of Agency.* However, the Court notes that no Illinois court has adopted the new version of the Restatement on Agency therefore it is merely persuasive authority. In any event, Section 1.04 does not change the Court's analysis. As noted above, there is sufficient evidence to create a question of fact as to Ms. Menaker's agency status regarding the statement.

Accordingly, defendant's motion for summary judgment is denied as to these issues.

*Defendant's Motion to Dismiss*

Next, defendant contends the complaint should be dismissed under Section 2-619(a)(9) as the statements are non-actionable under the "fair report" privilege. "The fair report privilege is a qualified privilege, which promotes our system of self-governance by serving the public's interest in official proceedings, including judicial proceedings." *Solaia Technology,* 221 Ill. 2d at 585. "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a

meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Restatement (Second) of Torts* § 611 (1977). A summary of the allegations of a complaint must be a "fair abridgment" that conveys to readers a "substantially correct account." *Solaia Technology*, 221 Ill. 2d at 589-90.

Defendant asserts the press release was a fair abridgment of the Ficaro Amended Verified Complaint because it conveys the gist of the complaint without adding extraneous material. The first and second paragraphs of the December 6, 2005 press release is merely a sum of the many allegations of the Ficaro complaint regarding the Marrocco affidavit, defendant argues. Also, the third and final paragraph of the statement is complimentary, expresses a generalized confidence in the rightness of his cause, and quotes the complaint's statement of Mr. Ficaro's qualifications.

Next, defendant argues the statements are not *per se* defamation but are susceptible to an innocent construction. "[E]ven if a statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction." *Tuite v. Corbitt*, 224 Ill. 2d 490, 502 (2006). "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be

interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*." *Chapski v. The Copley Press*, 92 Ill. 2d 344, 352 (1982).

Also, defendant asserts the press release may be interpreted as his biased presentation of his client's view of the pending case. Defendant cites to *Owen v. Carr*, where the defendant allegedly made a defamatory statement regarding the plaintiff while being interviewed for a magazine article. 113 Ill. 2d 273, 275-76 (1986). The Supreme Court agreed with the Appellate Court's finding "that, considered in its entirety, '[t]he article and words within it can reasonably be construed as an attorney's biased presentation of his client's view of a pending cause of action.'" *Id.* at 280. Because the press release refers to the complaint, defendant argues it was merely a means to present Mr. Ficaro's allegations to be proved at trial.

Next, defendant contends that press release may be interpreted to refer to someone other than plaintiff. "[I]f the statement may . . . reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*." *Chapski*, 92 Ill. 2d at 352. Defendant notes that the press release does not refer to anyone by name. Alternatively, defendant asserts the release cannot be read to clearly refer to any particular member of the group of defendants in the Ficaro complaint.

In addition, defendant reiterates that the press release does not refer to anyone by name. Thus, the

statements cannot be *per se* defamation. "[A] statement cannot be considered defamatory *per se* as to an individual unless the individual is named in the statement." *Moore v. Streit*, 181 Ill. App. 3d 587, 597 (2d Dist. 1989). Defendant also cites to *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, where the plaintiffs, Cyril and Paul Rosengarten, operated a clothing business named Imperial Apparel. 367 Ill. App. 3d 48, 51 (1st Dist. 2006). The plaintiffs alleged the defendant, a competitor, had defamed them *per se* in a statement published in a newspaper referring to "Cy and his son Paul" and "Empire rags center." *Id.* at 49-50. "Because the statements . . . do not refer to Imperial by name or give the last names of the individual plaintiffs, they could reasonably be interpreted as referring to someone other than the plaintiffs . . . [and] are not actionable *per se* . . ." *Id.* at 58. Defendant asserts that because reference to the Ficaro complaint is required to obtain the identity of persons referred to in the press release, the statements are not actionable.

Next, defendant contends the press release's language cannot be clearly be interpreted as imputing disreputable conduct to plaintiff Defendant points out the press release does not indicate which statements were made public by the defendants in the Ficaro complaint that the defendants knew the statements were false, or that the defendants intended to influence the outcome of the litigation.

Finally, defendant asserts the statements are protected expressions of opinion. "[I]f a statement is

defamatory *per se*, but not subject to an innocent construction, it still may enjoy constitutional protection as an expression of opinion." *Solaia Technology*, 221 Ill. 2d at 581. "[A] defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact." *Id.* Three considerations are used: 1) whether the statement has a precise and readily understood meaning; 2) whether the statement is verifiable; and 3) whether the statement's literary or social context signals that it has factual content. *Id.* Defendant contends the statements are not sufficiently precise to be considered anything but a protected opinion.

In *Dubinsky v. United Airlines Master Exec. Council*, the plaintiffs, former chairmen of an airline's executive committee, alleged they were defamed by an article written by one of the defendants. 303 Ill. App. 3d 317, 321, 328 (1st Dist. 1999). The article stated that the plaintiffs' motives should be questioned, whether the plaintiffs were "entirely honorable," and that "'some would prosecute them to the fullest extent of the law.'" *Id.* at 328. The Appellate Court "agree[d] with the trial court that the comments contained in the article are not objectively verifiable and cannot be interpreted as stating actual facts about plaintiffs." *Id.* Defendant argues the press release was ambiguous and imprecise as to the identity of the defendants and their actions.

In response, plaintiff David Missner disputes the applicability of the fair report privilege to the facts here. Plaintiff asserts *Solaia Technology*, cited by defendant,

is not applicable here because it did not involve a press release or comments by an attorney. Rather, the case dealt with critical statements printed by a magazine regarding the actions of a company and its attorneys in infringement claims for a patent. 221 Ill. 2d at 563-69. Plaintiff points out that defendant is not a media defendant but someone who participated in filing the amended Ficaro complaint and issued a statement thereafter. Plaintiff contends defendant cannot confer a fair reporting privilege on himself by reporting about a pleading he filed which contained a defamatory statement. Comment *c* to Section 611 of the Restatement provides:

> A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated . . . This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person . . .

In *Kurczaba v. Pollock*, the plaintiffs, who were attorneys practicing in the Polish community in Chicago, alleged the defendant attorney, who also practiced in the same community, committed defamation. 318 Ill. App. 3d 686, 690 (1st Dist. 2000). Specifically, the defendant filed a complaint alleging the plaintiffs engaged in wrongdoing in their law practice and later sent a copy of a proposed amended complaint to several prominent members of the Polish and Chicago communities. *Id.* at 690-91. The Appellate Court concluded the fair

reporting privilege did not apply because: 1) the defendant sought to confer the privilege on himself by making the original defamatory statement and then reporting it to others; and 2) the proposed amended complaint was not a fair abridgment because it was not yet filed. *Id.* at 708. Plaintiff argues the same rationale applies here.

Next, plaintiff argues the innocent construction rule does not apply. *Tuite* does not support defendant's assertions, plaintiff contends. There, the Supreme Court found that the statements at issue could not "reasonably be given an innocent construction." 224 Ill. 2d at 513. In addition, plaintiff asserts *Owen*, another case relied on by defendant, is distinguishable because the Supreme Court noted the article written based on the defendant's conditional statements, including "that it would be necessary to acquire evidence to supporting the complaint before [the defendant's] client could prevail." 113 Ill. 2d at 280. "Only *reasonable* innocent constructions will remove an allegedly defamatory statement from the *per se* category." *Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77, 90 (1996) (emphasis in original).

Further, plaintiff contends it is immaterial that the press release does not mention him by name as Ms. Menaker transmitted the amended Ficaro complaint with the release based on the Tribune's requirements. Thus, because the Chicago Tribune interpreted the statement in conjunction with the complaint and included plaintiff's name in the articles,

plaintiff claims there is no interpretation of the statement required. Alternatively, plaintiff asserts he can amend the complaint to include a *per quod* cause of action.

Finally, plaintiff argues the press release is not a protected opinion. First, plaintiff asserts it is objectively verifiable under *Imperial Apparel, Solaia Technology,* and *Bryson:* 1) that the Marrocco affidavit was false; 2) whether the affidavit actually contained Marrocco's signature; and 3) whether the affidavit was intended to extort settlement.

In reply, defendant cites to *Bryson* where the Supreme Court noted the defendants' motion was more properly considered under Section 2-619 and not Section 2-615 based on the defendants' reliance on "affirmative matters outside the pleadings . . ." 174 Ill. 2d at 92. Here, defendant points to the fact that he presented full copies of the underlying complaint and the press statement, which were not included in plaintiff's complaint.

Further, the fair report privilege applies because Ms. Menaker published the statement, defendant contends. "The privilege . . . is not . . . limited to . . . publishers . . . [but] extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public." *Restatement (Second) of Torts* § 611, Comment c. Therefore, defendant asserts Ms. Menaker may be considered under the fair report privilege. Additionally, defendant argues his alleged participation in preparing

the amended Ficaro complaint is not tantamount to having published, or causing the publication of, the complaint. Defendant points out plaintiff did not allege that he was involved in drafting the complaint, but merely that the law firm filed the complaint, which was signed by Richard Burke and verified by Mr. Ficaro. Further, defendant contends *Kurczaba* is factually distinguishable as it involved a proposed and un-filed amended complaint that was sent to various people. 318 Ill. App. 3d at 708.

Also, defendant reiterates that the statement is capable of an innocent construction and is not actionable as defamation *per se*. Defendant points out the statement begins with the caveat "As set forth in detail in an Amended Complaint . . ." Thus, the only reasonable interpretation of the statement is as a summary of the complaint. Further, defendant contends *Owen* is consistent *with Bryson* and *Chapski*, which introduced the innocent construction rule. The Supreme Court found the statement at issue, "considered as part of the whole article, may reasonably be said to permit an innocent interpretation." 113 Ill. 2d at 279.

As a preliminary matter, the Court notes that plaintiff should have attached a copy of the newspaper articles referred to in their complaint. However, so as not to exalt form over substance, the Court will consider these documents as if they were attached to the complaint, as well as the press release as there seems to be no question that these are the documents at issue. Because defendant's press statement was not included

in the pleadings, defendant's Section 2-619 motion is more in the nature of a motion for summary judgment, and the Court will consider it as such.

Additionally, the Court agrees with plaintiff and rejects defendant's arguments that: 1) the statement can be given an innocent construction; 2) plaintiffs are not mentioned in the statement; and 3) the statement is a protected opinion. According to Ms. Menaker, the Ficaro Amended Complaint was attached to the December 6, 2000 statement. Therefore, the recipient need only refer to the Amended Complaint to ascertain plaintiffs' identity and the conduct they were accused of. By the same reasoning, the statement cannot be a protected expression of opinion. Thus, *Imperial Apparel* and *Dubinsky*, relied on by defendant, are distinguishable. The Court will next consider defendant's fair report privilege arguments.

The complaint refers specifically to statements in two articles published on December 8, 2005, one in the Chicago Tribune and one in the Chicago Daily Law Bulletin. These articles include quotations of defendant's statement out of context. Defendant clearly cannot be held responsible for a third party's misquotation and failure to include the statement's full context. Despite this, defendant still may be liable for defamation. As stated above, there is a question of fact as to whether Ms. Menaker was defendant's agent. Further, it is undisputed that the December 6, 2005 statement was published by Ms. Menaker to Mr. Higgins at the Chicago Tribune. These facts establish a prima facie case of defamation.

*Appendix D*

Plaintiff argues the fair reporting privilege does not apply to defendant because he is not a "media defendant." The Court disagrees. Under Comment c to Section 611 of the Restatement, the privilege "extends to any person who makes an oral, written or printed report to pass the information that is available to the general public." Plaintiff also contends defendant, under Section 611 of the Restatement, may not confer the privilege on himself "by making the original defamatory publication himself and then reporting to other people what he had stated . . ." Here, defendant did not make the original, and allegedly defamatory, statement in the Amended Complaint. Rather, Mr. Ficaro signed a verification of the complaint pursuant to 735 ILCS 5/1-109. Section 1-109 provides that "[a]ny pleading . . . certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath." Mr. Ficaro, as defendant's client and the plaintiff in the underlying suit, is the party who made the statements contained in the Amended Complaint. Additionally, *Kurczaba*, cited by plaintiff, is factually distinguishable because it involved the defendant's distribution of an un-filed complaint. The Appellate Court found there could be no fair abridgment of a complaint that was not yet filed. 318 Ill. App. 3d at 708. Thus, defendant may claim a fair report privilege.

Regarding the fair report privilege, Illinois has adopted the test set forth in Section 611 of the Restatement but has declined "to place a judicial-action limitation on the privilege." *Solaia Technology*, 221 Ill.

2d at 589. The filing of a complaint is a "public act" and a fair report privilege "serves the public's interest in the judicial system . . ." *Id.* To qualify for the privilege, defendant's December 6, 2005 statement is a "fair abridgement" of the Ficaro Amended Complaint. Comment *f* to Section 611 of the Restatement provides guidance regarding the determination of a fair abridgement:

> It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.

In other words, "a court must determine if the sting of the defamatory statement in the proceeding is the same as the sting of the defamatory statement in the report." *Solaia Technology*, 221 Ill. 2d at 590. The December 6, 2005 press release states as follows:

> Statement of Robert A. Clifford in response to the filing of the Amended Complaint before judge Donald Suriano in Ficaro v. Bezold, et al. . . .
>
> As set forth in an Amended Complaint filed in the Cook County Circuit Court today (Tuesday Dec. 6, 2005), Mike Ficaro has been defamed and greatly wronged as a result of intentional [sic] false and scurrilous statements made

> public by the defendants in an attempt to improperly influence the outcome of some vigorously contested corporate litigation involving tens of millions of dollars.
>
> The Amended Complaint alleges that one or more of the defendants forged the signature of an ex-FBI agent to a fictitious [sic] created false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.
>
> The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit. Mike Ficaro is a highly experience [sic] former prosecutor and civil litigator who has enjoyed an impeccable reputation both professionally and personally throughout his long career. We know that he will be vindicated in the court of law.

The allegations of the Ficaro complaint are, in part, as follows:

- Defendants' intentional defamation caused Mr. Ficaro "to be defamed, and maligned and damaged [his] professional and personal reputation . . ."

*Appendix D*

- "The . . . intentional and malicious acts of Defendants . . . proximately caused [Mr. Ficaro] to suffered emotional distress, personal injury, embarrassment and loss of his reputation in his personal communities."

- ". . . Defendants threatened to defame [Mr. Ficaro] . . . unless [he] forced his clients to drastically reduce the money damages the clients were about to receive from an arbitration award against Defendant [Mr. Bezold]."

- "Defendants followed through on their threats . . . [and] republished the defamatory materials by leaking information concerning that affidavit . . . to the news media . . ."

- Defendants' plan "meets the elements of Hobbs Act extortion . . ."

- "[O]ne or more of the Defendants prepared defamatory content of the forged affidavit and placed MARROCCO's signature on the document without MARROCCO's knowledge or authorization in the furtherance of this fraudulent scheme."

- "The forged MARROCCO affidavit was filed separately and did not have the caption of the proceedings taking place before the bankruptcy court."

- "[T]he intent in forging the alleged MARROCCO affidavit and in filing it was to perpetrate a fraud on the court and the parties as part of the previously threatened extortion scheme . . ."

- In a voicemail to Mr. Ficaro's partner Gary Levenstein, David Missner stated: "These affidavits were obtained . . . in an attempt to convince the parties that . . . this arbitration was not anything but a fix . . . and the people we represent are obviously pretty desperate and re prepared to do just about anything to straighten this thing out . . .

- Mr. Missner further stated in the voicemail: "I suppose this could be interpreted as leverage that . . . they better settle or you know, or what this kind of thing and I guess you could look at it that way but that's not really, I mean, you know, like this guy really wants to file bankruptcy . . . I don't think so but if he does then these affidavits would be filed and they would be public and it would be

> unbelievable and I don't think it would be good for um, the firm that Mr. Ficaro works for either . . ."

The first and second paragraphs of the statement clearly refer to allegations of forgery of the affidavit in the Ficaro complaint. The third paragraph summarizes the statements in the complaint regarding Mr. Ficaro's qualifications and standing in his profession. After comparing the allegations in the Ficaro Amended Complaint to defendant's statement, the Court finds the statement is a fair abridgment of the allegations in the 67-page Amended Complaint. The statement, in effect, contains the same "sting" as the allegations of the complaint. Therefore, defendant's December 6, 2005 statement is privileged under the fair report doctrine.

Accordingly, defendant is granted summary judgment.

ENTER:

s/ Jennifer Duncan
Judge

## APPENDIX E — REPLY BRIEF IN SUPPORT OF DEFENDANT'S COMBINED MOTION TO DISMISS AND FOR SUMMARY JUDGMENT WITH EXHIBIT FILED OCTOBER 24, 2007

No. 06 L 012632

Calendar H

DAVID N. MISSNER,

Plaintiff,

v.

ROBERT A. CLIFFORD,

Defendant.

## REPLY BRIEF IN SUPPORT OF DEFENDANT'S COMBINED MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Faced with Defendant Robert A. Clifford's combined motion to dismiss and for summary judgment pursuant to 735 ILCS § 5/2-619.1, Plaintiff N. Missner—his co-plaintiff already having voluntarily dismissed his suit—has responded with pleadings that 1) improperly advance an entirely new theory of liability unmentioned in his complaint and 2) continue to misrepresent both the statement of which he complains and Defendant Clifford's lack of involvement in its publication. Defendant Clifford's combined motion should be granted.

*Appendix E*

## I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE HE DID NOT PUBLISH THE STATEMENT OF WHICH PLAINTIFF COMPLAINS

The allegations of Plaintiff's complaint are unequivocal. According to the complaint, non-party Clifford Law Offices, P.C. filed a complaint against Plaintiff and others on behalf of non-party Michael Ficaro ("the Ficaro Verified Amended Complaint"). (Compl., ¶ 9). Thereafter, Plaintiff alleges claims against Defendant Clifford individually, such as "defendant Clifford ***maliciously and wrongfully stated*** to the Chicago print media, including the Chicago Tribune and the Chicago Daily Law Bulletin" that Plaintiff had committed several forms of misconduct. (*Id.* at ¶ 10) (emphasis added). Plaintiff further alleges that Defendant Clifford "either knew that those statements were false, or defendant ***proceeded to make those statements*** in reckless disregard of their truth or falsity." (*Id.* at ¶ 11) (emphasis added). Plaintiff also alleges that Defendant Clifford "falsely, maliciously and wrongfully intended to injure and destroy plaintiffs' good name and reputation; and to expose plaintiffs to public contempt, hatred, suspicion, and financial injury." (*Id.* at ¶ 12). In short, Plaintiff's complaint alleges that Defendant Robert A. Clifford maliciously made false statements about Plaintiff to the *Chicago Tribune* ("*Tribune*") and the *Chicago Daily Law Bulletin* ("*Law Bulletin*") with the intent of injuring Plaintiff.

*Appendix E*

Not even Plaintiff can stand by the truth of those allegations any more. As detailed in Defendant Clifford's motion for summary judgment and substantiated by the affidavits attached thereto, Defendant Clifford did not make, did not see, and did not talk with any of his colleagues about any statements concerning Plaintiff to the *Tribune* or *Daily Law Bulletin.* (See Ex. A, Clifford Aff., ¶¶ 2-4). Instead, the statement of which Plaintiff complains was sent to the *Tribune* alone by non-party Pamela S. Menaker, an employee of non-party Clifford Law Offices, P.C. (Ex. B, Menaker Aff, ¶ 3).[1] The deposition testimony of both Defendant Clifford and Menaker is consistent with each's respective affidavit.

In his Response to Defendant's Motion for Summary Judgment, Plaintiff concedes that his complaint's allegations are false. He concedes that Ms. Menaker, and not Defendant Clifford, sent out the press statement to the *Tribune.* (Resp. to Mtn. for Summ. Judg., pp. 1, 5). He concedes that Ms. Menaker did not even attempt to contact Defendant Clifford before issuing the statement, because he was out of town on vacation and had told her not to call him about anything. (*Id.* at p. 6). In short, Plaintiff concedes that Defendant Clifford ***did not*** make any statements, let

1. Plaintiff states in his Response to Defendant's Motion for Summary Judgment that "[a] similar statement was issued to the Chicago Daily Law Bulletin." (Resp. to Mtn. for Summ. Judg., p. 1). Plaintiff does not cite to any evidence in support of this contention. By contrast, Ms. Menaker testifies in her affidavit that she has no record or recollection of sending the statement to the *Law Bulletin.* (Ex. B, Menaker Aff., ¶ 4).

alone maliciously make false statements to the *Tribune* and *Law Bulletin* with the intent of injuring and humiliating Plaintiff.

## A. SUMMARY JUDGMENT ON THE PLEADINGS IS INDISPUTABLY PROPER

Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pagano v. Occidental Chem. Corp.*, 257 Ill. App. 3d 905, 908 (1st Dist. 1994). The subject of a summary judgment motion is the "claims ***as pled by the plaintiff***. . . ." *Id.* at 911. Here, it is undisputed that the claim that Plaintiff pled in his complaint—that Defendant Clifford individually made false statements about Plaintiff to the *Tribune* and *Law Bulletin*—is false. Clearly, then, this Court should grant summary judgment on Plaintiff's complaint.

To salvage his now-deficient pleading, Plaintiff attempts in his Response to Defendant's Motion for Summary Judgment to argue a new theory of liability—that Defendant Clifford might be held liable if Ms. Menaker acted as his actual or apparent agent when she issued a statement to the *Tribune*. *As* discussed below, there is no evidentiary or legal support for this theory. Further, the case law is clear on the point that Plaintiff may not now raise this new theory of liability to avoid summary judgment.

*Pagano* is directly controlling. There, the defendants had moved for summary judgment on the plaintiff's complaint, which alleged that the defendants had been negligent in at least seven different respects. *Pagano*, 257 Ill. App. 3d at 907-08. On appeal, the plaintiff asserted that summary judgment was improper because the defendants were negligent in a manner that had not been alleged in the complaint. *Id.* at 910-11. The appellate court affirmed the trial court's grant of summary judgment. The appellate court reasoned:

> A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint. The very purpose of a complaint is to advise the defendant of the claim it is called upon to meet. In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy. ***If the defendant is entitled to judgment as a matter of law as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which might create a right of recovery against the moving defendant on some unpled claim or theory.***

*Id.*

Just as *in Pagano*, Plaintiff's belated attempt to advance a new theory of liability cannot salvage his complaint. Defendant Clifford's motion for summary judgment should be granted.

In addition, Illinois law requires that: "[a] complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (Ill. 1996). Plaintiff's complaint obviously fails to meet this requirement, insofar as it doesn't even mention an agency relationship between Defendant and Ms. Menaker. Thus, even if Plaintiff's complaint could somehow be construed to assert an agency theory of liability, it should be dismissed pursuant to 735 ILCS § 5/2-615.

## B. PLAINTIFF'S NEWLY ADVANCED THEORY OF LIABILITY IS NOT SUPPORTED BY FACT OR LAW

Even if Plaintiff's new theory could be considered at this point, summary judgment would still be appropriate, because the evidence is clear that Ms. Menaker was not Defendant Clifford's actual or apparent agent. This Court should not only grant Defendant Clifford's motion for summary judgment, but also deny the Plaintiff's likely motion for leave to amend his complaint.

### 1. MS. MENAKER WAS NOT DEFENDANT'S ACTUAL AGENT

Plaintiff references the deposition testimony of Defendant Clifford and Ms. Menaker in arguing that there was an actual agency relationship between the

two. (See Resp. to Mot. for Summ. Judg., p. 2). However, their testimony establishes that Ms. Menaker was not Defendant Clifford's actual agent, but instead that they were both co-agents to their employer, non-party Clifford Law Offices, P.C. "[A]gency is a consensual, fiduciary relationship in which the principal has the right to control the activities of the agent and the agent has the power to conduct legal transactions in the principal's name." *Health Cost Controls v. Sevilla*, 365 Ill. App. 3d 795, 806 (1st Dist. 2006). The existence of an agency relationship is usually a question of fact, but becomes a question of law when the facts regarding the relationship are undisputed or no liability exists as a matter of law. *Oliveira-Brooks v. Re/Max Internat'l, Inc.*, 372 Ill. App. 3d 127, 134 (1st Dist. 2007). "The burden of proving the existence of an agency relationship and the scope of authority is on the party seeking to charge the alleged principal"—in this case, Plaintiff. *Id.*

Here, as Plaintiff acknowledges, Defendant Clifford testified that both he and Ms. Menaker are co-employees of the law firm Clifford Law Offices, P.C.:

> [T]here's no question that Pamela Menaker is an agent and employee of Clifford Law Offices, P.C., just as I am. I don't view myself as something other than and in addition to that. Yes, I am the sole shareholder of CLO, but I'm no less and no more an employee of that corporation than she is. So if you're trying to make me, you know, another third person or some such thing I'll give you a no to that.

(Ex. C, Clifford Dep., p. 20, lines 9-18). Defendant Clifford and Ms. Menaker both testified that Ms. Menaker had authority from their employer, Clifford Law Offices, P.C., to publish press statements, including the statement of which Plaintiff complains and which was captioned with Defendant Clifford's name. (Ex. C, Clifford Dep., p. 26, lines 10-24; Ex. D, Menaker Dep., p. 11, lines 4-13). On the other hand, Ms. Menaker testified that she did not have authority from Defendant Clifford in his personal capacity to issue statements on his personal behalf. (Ex. D, Menaker Dep., p. 11, lines 11-13). In other words, Ms. Menaker, ***as an employee of Clifford Law Offices, P.C.,*** had authority ***from her employer, Clifford Law Offices, P.C.,*** to issue statements on behalf of Defendant Clifford ***as an employee of Clifford Law Offices, P.C.*** On the other hand, Ms. Menaker had no authority to issue statements on behalf of Defendant Clifford in his individual capacity, nor is there any evidence that Defendant Clifford had any personal authority to compel Ms. Menaker to publicize his opinions on matters unrelated to the business of their employer, Clifford Law Offices, P.C.

This evidence therefore establishes that there was no agent-principal relationship between Ms. Menaker and Defendant Clifford in their individual capacities. There is no indication that Defendant Clifford had any personal right to control Ms. Menaker's activities, nor Ms. Menaker any power to conduct legal transactions on behalf of Defendant Clifford in his individual capacity. Instead, both Ms. Menaker and Defendant Clifford were simply co-agents to a common principal, Clifford Law

Offices, P.C. *See, e.g.*, Restatement (Third) of Agency § 1.04(1), (9) ("Coagents have agency relationships with the same principal.. . . . A superior coagent has the right, conferred by the principal, to direct a subordinate coagent."). Co-agents are not agents to each other in their individual capacities, and therefore neither may be held individually liable for the other's acts: "In a relationship of coagency, neither agent is the other's agent [and] neither is vicariously liable for wrongs committed by the other." *Id.* at comment a.

By seeking to hold Defendant Clifford directly liable for the actions of his co-employee, Ms. Menaker, Plaintiff seeks to cut out the "middleman" that mediates their relationship, Clifford Law Offices, P.C. Plaintiff's reason for doing so is obvious. Plaintiff could have named Clifford Law Offices, P.C. as a defendant when he filed his complaint, but did not.[2] Now he is precluded from doing so by the one-year statute of limitations, 735 ILCS § 5/13-201, because the statement of which he complains was published in December 2005. (See Compl., ¶ 10).

2. In his original complaint, Plaintiff alleged that "Clifford's law firm" (i.e., Clifford Law Offices, P.C.) had filed the Ficaro Verified Amended Complaint. (Compl., ¶¶ 9, 10). Then, according to plaintiff, Defendant Clifford issued a statement describing that complaint. (*Id.* at ¶ 10). In one of the newspaper accounts cited in Plaintiff's complaint, comments from the press statement were attributed to "Robert A. Clifford of Clifford Law Offices. . . . (See Exhibit E, *Law Bulletin* Article). Based on these facts, Plaintiff was clearly aware of Clifford Law Offices, P.C.'s involvement in the issuance of the press statement.

Plaintiff's neglect does not now allow him to bend the rules of agency, though.

Plaintiff argues that Defendant Clifford's deposition testimony is somehow unreliable because it involves the parties' "intent" as to their relationship. (See Resp. to Mtn. for Summ. Judg., p. __). Yet Plaintiff has supplied no affidavits under Illinois Supreme Court Rule 191 or pointed to any other evidence contradicting the testimony of Defendant Clifford and Ms. Menaker. In support of his theory, Plaintiff only cites the facts that 1) Ms. Menaker issued press statements captioned with Defendant Clifford's name and 2) Defendant Clifford testified that Ms. Menaker had the authority to do so. (See Resp. to Mot. for Summ. Judg., p. 8). Both of these facts, however, are entirely consistent with the co-agency relationship described by Defendant Clifford and Ms. Menaker: Ms. Menaker, ***as an employee of Clifford Law Offices, P.C.,*** had authority ***from her employer, Clifford Law Offices, P.C.,*** to issue statements on behalf of Defendant Clifford, ***as an employee of Clifford Law Offices,*** *P.C.*

According to Plaintiff, however, the fact that Ms. Menaker issues press statements captioned with Defendant Clifford's name is circumstantial evidence of an actual agency relationship between Defendant Clifford and Ms. Menaker, and all possible inferences that may be drawn from this fact must be permitted Plaintiff on a motion for summary judgment. (*Id.* at pp. 4-5). Plaintiff misconstrues the nature of circumstantial evidence. "Circumstantial evidence is the proof of

certain facts and circumstances from which a fact finder may infer other connected facts that usually and reasonably follow according to the common experience of mankind." *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 397-98 (1st Dist. 2000). However, circumstantial evidence is sufficient to create a question of fact on a motion for summary judgment only when it "make[s] the conclusion reached the more probable, as opposed to possible, one." *Id.* at 398. It may be ***possible*** to infer from the fact that Ms. Menaker issues press statements captioned with Defendant Clifford's name that there is some sort of undisclosed personal agency relationship between the two in circumstances not involving a Verified Amended Complaint filed for a client by Clifford Law Offices, P.C.; however, it is more probable to infer that Defendant Clifford and Ms. Menaker share the co-agency professional relationship they described in their deposition testimony in this circumstance, where the press statement describes the allegations of the Ficaro Verified Amended Complaint filed by Clifford Law Offices, P.C. Plaintiff's "circumstantial evidence" would not create a question of fact sufficient to prevent summary judgment on the issue of actual agency.

### 2. DEFENDANT CANNOT, AS A MATTER OF LAW, BE HELD LIABLE FOR MS. MENAKER'S ALLEGED APPARENT AGENCY

Plaintiff's central argument in his Response to Defendant's Motion for Summary Judgment appears to be that Defendant Clifford should be held individually

liable because the statement that Ms. Menaker made makes it ***appear*** as if she has authority to make statements on behalf of Defendant Clifford in his personal capacity. Thus, Plaintiff seeks to hold Defendant Clifford liable on a theory of apparent authority. "Apparent authority is rooted in the doctrine of equitable estoppel and is based upon the idea that if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party responsibly relies on the apparent agency and is harmed as a result." *Oliveira-Brooks*, 372 Ill. App. 3d at 137 (quotation omitted). "To prove apparent agency, one must establish: (1) that the principal held the agent out as having authority or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that an agency relationship existed; and (3) the third person relied on the agent's apparent authority to his detriment." *Id.*

The necessary elements of apparent authority are missing in this case. First, as to the second element, no one who read Ms. Menaker's statement could have reasonably concluded that she was authorized to make statements for Defendant Clifford in his personal capacity. The statement Ms. Menaker published, as an employee of non-party Clifford Law Offices P.C., was a comment on a case filed by Clifford Law Offices, P.C. Thus, the circumstances of the publication do not give rise to any impression that Ms. Menaker was authorized to speak on behalf of Defendant Clifford in his personal

capacity, instead of as a co-agent with Defendant Clifford to their common employer, Clifford Law Offices, P.C.

Second, there is no evidence whatsoever that Plaintiff relied upon ***any*** representation that Ms. Menaker was an agent to Defendant Clifford. Ms. Menaker made her statement to a reporter for the *Tribune,* not to Plaintiff. Plaintiff did not even see Ms. Menaker's statement until after he filed his complaint and conducted discovery. Therefore, the evidence demonstrates that Defendant Clifford could not be held liable to Plaintiff on a theory of either actual or apparent authority. This Court should grant Defendant Clifford's motion for summary judgment and deny any request by Plaintiff to amend his complaint.

## II. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE STATEMENT IS NON-ACTIONABLE AS A MATTER OF LAW

Regardless of who conceivably could be held responsible for the statement that Ms. Menaker published, the arguments advanced in Defendant Clifford's section 2-619(a)(9) motion to dismiss supply additional bases for dismissing Plaintiff's complaint with prejudice. For the reasons discussed below, the statement is non-actionable as a matter of law.

*Appendix E*

## A. DEFENDANT'S MOTION TO DISMISS WAS PROPERLY BROUGHT UNDER SECTION 2-619(a)(9)

Plaintiff first argues that Defendant Clifford's motion to dismiss, brought pursuant to section 2-619(a)(9), 735 ILCS § 5/2-619(a)(9), is procedurally improper since the claims of fair report, innocent construction, and constitutionally protected opinion are not affirmative defenses. Plaintiff's argument is convoluted, but easily dispensed with by reference to *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 91-92 (Ill. 1996). Just as Plaintiff here, the defamation plaintiff in *Bryson* did not attach a copy of the allegedly defamatory publication to her complaint. The defendants in *Bryson* filed a motion to dismiss under section 2-615, 735 ILCS § 5/2-615, to which they attached a full copy of the allegedly defamatory statement and argued, among other things, that the complaint should be dismissed because the statement was capable of an innocent construction and was constitutionally protected opinion. The Illinois Supreme Court held that the motion had been brought improperly under section 2-615 and instead considered the motion under ***section 2-619***, because the motion relied upon the extrinsic matter of the allegedly defamatory publication.

Here, just as in *Bryson*, Defendant Clifford has simply attached a full copy of the allegedly defamatory statement that was not included in Plaintiff's compliant and raised arguments—including the possibility of an innocent construction and constitutional protection—

based upon that extrinsic matter. As *Bryson* clearly demonstrates, Defendant Clifford properly brought this motion pursuant to section 2-619(a)(9).

### B. THE "FAIR REPORT" PRIVILEGE APPLIES TO MS. MENAKER'S STATEMENT BECAUSE DEFENDANT DID NOT PUBLISH THE FICARO VERIFIED AMENDED COMPLAINT

As argued in his memorandum in support of his motion to dismiss, the "fair report" privilege protects Defendant Clifford from any individual liability. This privilege protects from liability those who publish a "fair abridgement" of a filed complaint so long as the abridgement conveys to readers "a substantially correct account" of the complaint. *Solaia Tech, LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 589-90 (Ill. 2006). The purpose of the privilege is to serve "the public's interest in official proceedings, including judicial proceedings." *Id.* at 585. The question of whether a publication is privileged—under the "fair report" privilege or any other—is a question of law for the Court. *Id.*

Plaintiff does not dispute that Ms. Menaker's statement is a legally permissible fair abridgement of the Ficaro Verified Amended Complaint. Instead, Plaintiff attempts to argue that the fair report privilege is not applicable for two reasons. First, Plaintiff notes that Defendant Clifford is not a "media defendant." The distinction is meaningless. The "fair report" privilege is not limited to the media, but instead extends to "any

person who makes an oral, written or printed report to pass on the information that is available to the general public." Restatement (Second) of Torts § 611, comment c. Ms. Menaker's statement fairly abridged the Ficaro Verified Amended Complaint, a matter of public record and a publication that Plaintiff concedes is privileged pursuant to the absolute attorney litigation privilege. (See Resp. to Mot. to Dismiss, p. 8 ("The filing of the pleading was and is privileged."); *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165 (1st Dist. 2003) ("An attorney at law is absolutely privileged to publish false and defamatory matter of another concerning communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.") (quoting Restatement (Second) of Torts § 586).

Second, Plaintiff contends that Defendant Clifford is not protected by the fair report privilege because of a self-conferral exception to the privilege. Pursuant to this exception, "[a] person cannot confer [the fair report] privilege upon himself by ***making the original defamatory publication himself*** and then reporting to other people what he stated. This is true whether the original publication was privileged or not." Restatement (Second) of Torts § 611, comment (c) (quoted in *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 708 (1st Dist. 2000)) (emphasis added).

According to Plaintiff, this exception applies to Defendant Clifford because a) he "caused" Ms. Menaker's publication of the statement and b) "he is the person who filed, or participated in the preparation before filing of[,] the Ficaro Verified Amended Complaint" that Ms. Menaker's statement summarized. (Resp., p. 8). This argument clearly misstates the Restatement's rule. Merely "participat[ing] in the preparation before filing" of the Ficaro Verified Amended Complaint—whatever that conduct might entail—is not tantamount to having published, or even having caused the publication of, the Ficaro Verified Amended Complaint.

In any case, Plaintiff has failed to show the applicability of either the Restatement's exception as actually written or his baseless revision of it. Plaintiff's complaint does not allege that Defendant Clifford had any involvement in the filing of the Ficaro Verified Amender' Complaint.[3] Instead, Plaintiff alleges that

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3. Plaintiff claims that he is permitted to rely on Defendant's deposition testimony in arguing against Defendant's 2-619(a)(9) motion, but does not thereafter cite the testimony. Defendant's testimony actually supports the conclusion that he had no involvement in the publishing of the Ficaro Verified Amended Complaint:

> Q. Okay. The press release in this case was event-related in the sense that you had filed an amended complaint in the *Ficaro* case, correct?
>
> A. An amended complaint in the [*Ficaro*] case was filed. I answered as I did because you said "when

(Cont'd)

"defendant Clifford's law firm filed" the Ficaro Verified Amended Complaint. (Compl., 9, 10). Plaintiff reiterates this allegation in his Response to Defendant's Section 2-619 Motion to Dismiss. (Resp. to Mot. to Dismiss, p. 5). The Ficaro Verified Amended Complaint itself shows that it was verified by Michael A. Ficaro, and was signed by Clifford Law Offices, P.C.'s employee Richard F. Burke, Jr. (Ex. F, Ficaro Verified Amended Compl., pp. 67-68). Thus, Plaintiff has neither alleged nor cited any evidence that Defendant Clifford filed, or even "participated in the preparation before filing" of, the Ficaro Verified Amended Complaint.[4] Instead, Plaintiff

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(Cont'd)

> you filed the amended complaint," and we both know I did not do that.
>
> A. . . . [C]ertainly if I had been shown the amended complaint, would I have had the authority to say, 'Do not file this'; and the answer to that question is a yes. It could be the fifth amended complaint, and the answer to that would be yes. But I never saw the amended complaint before it was filed. I never drafted it. I never had anything to do with it in this context of a draft in exercise. I wasn't even here.

(Ex. C, Clifford Dep., p. 11, lines 3-9; p. 14, lines 4-12).

4. This factual difference is sufficient to distinguish *Kurczaba*, in which the defendant-attorney was alleged to have filed himself the amended complaint he later disseminated attached to an advertisement for one of the plaintiffs' law firm. *Kurczaba*, 318 Ill. App. at 690-91. *Kurczaba* is also distinguishable because the court's holding that the "fair report" privilege did not apply was also based on the facts that

(Cont'd)

once again tries to blur the distinction between the actions of non-party Clifford Law Offices, P.C. and Defendant Robert A. Clifford individually. Plaintiff's complaint should be dismissed with prejudice.

### C. MS. MENAKER'S STATEMENT, AS CONCERNING PLAINTIFF, IS CAPABLE OF AN INNOCENT CONSTRUCTION AND IS THEREFORE NON-ACTIONABLE AS DEFAMATORY *PER SE*

Plaintiff next contends that Ms. Menaker's statement is not capable of an innocent construction. Whether a statement is reasonably capable of an innocent construction is a question of law for the Court. *Bryson*, 174 Ill. 2d at 90. Contrary to Plaintiffs argument, Ms. Menaker's statement clearly and repeatedly indicates that its contents are allegations "to be proved at the trial of the complaint," rather than unequivocal statements of fact, and it is therefore non-actionable as defamatory *per se* pursuant to *Owen v. Carr*, 113 Ill.2d 273, 279 (Ill. 1986). The statement's sentences begin with such qualifications as "As set forth in detail in an Amended Complaint. . . ." and "The Amended Complaint alleges . . ." Moreover, the statement's reference to "one or more defendants"

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(Cont'd)

1) the defendant's publication was not a "fair abridgement" of the amended complaint, and 2) the amended complaint was not yet part of an official proceeding because it had been filed without leave of the court. *Id.* at 708. Neither of those two last circumstances is at issue here.

named in the Ficaro Verified Amended Complaint cannot reasonably be construed as imputing any particular conduct to any particular individual, much less the only plaintiff remaining in this case. Indeed, even the Ficaro Verified Amended Complaint itself made clear that Plaintiff had no involvement in any forgery of the Marrocco affidavit, in that it alleged that Plaintiff did not receive the affidavit until after it was forged. (See Ex. F, Ficaro Verified Amended Comp., ¶ 85).

### 1. MS. MENAKER'S STATEMENT MERELY RELATES THE ALLEGATIONS OF THE COMPLAINT, NOT UNEQUIVOCAL FACTS

In *Owen*, the Illinois Supreme Court held non-actionable an attorney's statement to the press that individuals against whom he had filed suit on behalf of his client had "'wrongfully abused [the privilege afforded by filing a judicial inquiry] and should be held liable. . . .'" *Owen*, 113 Ill. 2d at 276. Also non-actionable was the attorney's statement that one of the defendants had "'not file[d] his complaint in the interest of justice, but instead was trying deliberately to intimidate [the attorney's client] and other judges . . . .'" *Id.* While these statements certainly seem on their face to unequivocally accuse the defendants of wrongdoing, the Court looked at the context in which those statements were presented and determined that they were not necessarily actual statements of fact, but rather could be innocently construed as allegations "to be proved at the trial of the complaint" by the attorney who made them. *Id.* at 279.

*Appendix E*

While Plaintiff contends that Ms. Menaker's press statement "is absolute and assertive," (Resp. to Mot. to Dismiss, p. 12), the statement itself belies any such interpretation. Instead, it begins with the *caveat*, "As set forth in detail in an Amended Complaint. . . ." (Ex. G, Statement). The statement prefaces its summaries of the Ficaro Verified Amended Complaint's allegations with qualifications such as, "The Amended Complaint alleges . . ." and "The complaint further alleges . . . ." (*Id.*). Not only is it reasonable to interpret Ms. Menaker's statement as merely relating the allegations of the Ficaro Verified Amended Complaint to be proved at trial, that is the *only* reasonable interpretation of the statement.

Plaintiffs contention that *Owen* was overruled *sub silentio* by *Bryson, supra, is* without merit. According to Plaintiff, *Bryson* introduced a new rule that the innocent construction doctrine permits only "reasonable" constructions, which vitiated the rule in *Owen*. However, that formulation of the innocent construction doctrine was actually introduced by the Illinois Supreme Court in *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (Ill. 1982) and applied by the Court in *Owen* four years later. Indeed, the Court in *Owen* cited *Chapski* for the proposition that, if an allegedly defamatory statement "may *reasonably* be innocently interpreted or *reasonably* be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*." *Owen*, 113 Ill. 2d at 279 (citing *Chapski*, 92 Ill. 2d at 352) (emphasis added). Applying that rule, the Court in *Owen* held that the defendant-

attorney's statements, "considered as part of the whole [publication], may *reasonably* be said to permit an innocent construction." *Owen*, 113 Ill. 2d at 279 (emphasis added). Thus, *Owen* applies the same innocent construction doctrine that has been in effect in Illinois since at least 1982 and is still good law. For the above reasons, Plaintiff's complaint should be dismissed with prejudice.

### 2. MS. MENAKER'S STATEMENT NEED NOT BE CONSTRUED TO IMPUTE ANY MISCONDUCT TO PLAINTIFF

Plaintiff concedes that Ms. Menaker's statement relates only that "one or more defendants" were responsible for the actions alleged in the Ficaro Verified Amended Complaint and does not mention Plaintiff by name. (See Resp. to Mot. to Dismiss, pp. 10, 12). Plaintiff also apparently concedes, per *Imperial Apparel, Ltd. v. Cosmo's Designer Direct*, 367 Ill. App. 3d 48, 57-58 (1st Dist. 2006), that allegedly defamatory statements are not actionable *per se* if they reasonably can be interpreted as referring to someone other than the plaintiff. (See Resp. to Mot. to Dismiss, pp. 13-14). Based on these facts alone, one would think that Plaintiff would then have to concede that the statement is not actionable *per se*, insofar a representation that "one or more defendants" committed misconduct reasonably can be construed as referring to any of the numerous defendants named in the Ficaro Verified Amended Complaint ***other than*** Plaintiff.

*Appendix E*

Defying logic, Plaintiff insists that Ms. Menaker's statement is actionable *per se*. According to Plaintiff, the *Tribune* reporter to whom Ms. Menaker sent the statement did not have "to interpret anything regarding the identity of the persons referred to in the statement" because he also received a copy of the case caption and the Ficaro Verified Amended Complaint. (Resp. to Mot. to Dismiss, p. 14). The central problem with this argument is that the reporter's consultation of the Ficaro Verified Amended Complaint could have only elucidated the identities of all of the defendants, in general, and not of the "one or more defendants" referenced in Menaker's statement.

As Plaintiff has conceded, the publication of the Ficaro Verified Amended Complaint was privileged. (See Resp. to Mot. to Dismiss, p. 8). Even if the Ficaro Verified Amended Complaint's allegations were at issue, though, they could not be construed to impute any particular wrongdoing to Plaintiff. Indeed, the Ficaro Verified Amended Complaint itself attributes the forgery of the Marrocco affidavit to "one or more of the Defendants." (See Ex. F, Ficaro Verified Amended Compl., ¶¶ 79-80). Even more importantly, the Ficaro Verifed Amended Complaint attributes the forgery of the Marrocco affidavit to "one or more of the Defendants" ***other than*** Plaintiff. Paragraph 85 of the complaint alleges that: "On or before July 9, the date of the phone call and message to Plaintiff Ficaro's partner publishing the defamatory material, one or more Defendants sent a copy of the forged Marrocco affidavit to Betzold's bankruptcy counsel, Defendants Missner, Choslovsky,

and DLA." Thus, the Ficaro Verified Amended Complaint alleges that the Marrocco affidavit was forged ***before*** Plaintiff even received it.[5] As discussed in detail in Defendant Clifford's memorandum in support of his motion, Ms. Menaker's statement, even if read alongside the Ficaro Verified Amended Complaint, cannot be reasonably interpreted to impute any particular misconduct to any particular individual, especially Plaintiff. Thus, it cannot be actionable *per se* pursuant to the innocent construction rule.

Plaintiff then contends, confusingly, that the statement is actionable because the reporter who received it then published an article that mentioned Plaintiffs name. It is entirely unclear how Defendant Clifford might be held responsible for that reporter's independent composition, based not only upon Ms. Menaker's statement but also on the Ficaro Verified Amended Complaint—the publication of which (again) Plaintiff concedes was privileged. The only publication that matters is Ms. Menaker's press statement. As

5. Defendant must also correct a blatant factual misstatement concerning the Marrocco affidavit made in both Plaintiff's complaint and his Response to Plaintiff's Motion to Dismiss. Contrary to Plaintiff's representations, the Marrocco affidavit *was not* filed as an attachment to the Motion to Enforce the Automatic Stay that Plaintiff filed. Instead, the Marrocco affidavit was filed separately. This fact is substantiated by the U.S. Bankruptcy court electronic docket sheet attached hereto as Exhibit H, which has separate entries for a "Motion to Enforce Automatic Stay Filed by David Missner on behalf of Nicholas William Betzold Jr." and "Affidavit Filed by Francis N Marrocco." (See Ex. H, Entries #3 and #6).

discussed above, it is clear that the statement does not impute any particular misconduct to any particular individual, including Plaintiff. Plaintiff's complaint should be dismissed with prejudice.

### D. THE STATEMENT SPECIFICALLY IDENTIFIED IN PLAINTIFF'S MOTION IS CONSTITUTIONALLY PROTECTED OPINION

Whether an allegedly defamatory statement is a constitutionally protected statement of opinion is a question of law for the Court. *Brennan v. Kadner*, 351 Ill. App. 3d 963, 969 (1st Dist. 2004). Defendant Clifford's motion specifically identified the statement's representation that "The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit" as insufficiently precise to constitute a statement a fact. Thus, Defendant Clifford argued that the sentence was a constitutionally protected expression of opinion. Plaintiff does not contest this argument in hi[s] response. To the extent Plaintiff's complaint seeks to state a cause of action based upon this statement, it should be dismissed with prejudice.

*Appendix E*

## CONCLUSION

For the foregoing reasons, Defendant Robert A. Clifford respectfully requests that this Court dismiss Plaintiff David N. Missner's complaint, in its entirety and with prejudice; award summary judgment in Mr. Clifford's favor as to all of the relief sought against him; and award to Mr. Clifford any other relief that the Court deems just and appropriate.

Respectfully submitted,

s/ Peter C. John
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*Appendix E*

**EXHIBIT A**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION**

No. 06 L 012632

Calendar H

DAVID N. MISSNER and WILLIAM CHOSLOVSKY,

Plaintiffs,

v.

ROBERT A. CLIFFORD,

Defendant.

**AFFIDAVIT OF ROBERT A. CLIFFORD**

Robert A. Clifford, an attorney, on oath states:

1. I am the defendant named in the suit entitled *David N. Missner and William Choslovsky v. Robert A. Clifford* pending in the Circuit Court of Cook County, Illinois as Cause No. 06 L 12632.

2. I personally had no discussions or communications of any kind at any time with any newspaper representatives concerning statements alleged in Paragraph 10 of Plaintiff's Complaint at Law which quotes the *Chicago Tribune* and the *Chicago Daily Law Bulletin's* December 8, 2005 articles. I also had no discussions or

communications of any kind at any time with representatives of any newspaper about the allegations of the Verified Amended Complaint filed on December 6, 2005 in the action entitled *Michael A. Ficaro v. Nicholas Betzold, Jr., et al* in the Circuit Court of Cook County, IL, as Case No. 05 L 8474.

3. Between December 6, 2005, the date the Verified Amended Complaint was filed in the case of *Ficaro v. Betzold, Jr., et al.*, and December 8, 2005, the date the newspaper articles were published, I was out of town. I was in Monterey, CA from December 3, 2005 until December 9, 2005 and had no communications, either orally, or by e-mail, or by fax, with my office concerning the statements in the articles quoted in Paragraph 10 of Plaintiff's Complaint at Law.

4. I did not see, read, receive, or have read to me the draft Press Release or the Press Release sent to the *Chicago Tribune* as stated in Pamela S. Menaker's Affidavit. Nor did I have any discussion or input with anyone concerning the wording of the Press Release prior to its disclosure to the *Chicago Tribune*. I never saw the Press Release referred to in Pamela S. Menaker's Affidavit until after this suit was filed against me personally on December 4, 2006.

Further Affiant Sayeth Not.

s/ Robert A. Clifford
Robert A. Clifford

February 19, 2007
Document #: 734726

## APPENDIX F — MOTION FOR LEAVE TO WITHDRAW OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION FILED MARCH 19, 2007

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION**

No. 06 L 12632

DAVID N. MISSNER and WILLIAM CHOSLOVSKY,

Plaintiffs,

vs.

ROBERT A. CLIFFORD,

Defendant.

**MOTION FOR LEAVE TO WITHDRAW**

PHILIP J. NATHANSON AND THE NATHANSON LAW FIRM move this Court, pursuant to Supreme Court Rule 13(c), for Leave to Withdraw as counsel for co-plaintiff, WILLIAM CHOSLOVSKY, and in doing so state the following reasons in support of this Motion:

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1. Plaintiff, WILLIAM CHOSLOVSKY'S last known business address is 203 N. LaSalle Street, Suite 1900, Chicago, IL 60601.

2. On March 16, 2007, the attorneys filing this motion to withdraw, PHILIP J. NATHANSON AND THE NATHANSON LAW FIRM, and co-plaintiff, WILLIAM CHOSLOVSKY, acknowledged that irreconcilable differences between them had reached the point where it would be in the best interests of both plaintiffs for co-plaintiff, WILLIAM CHOSLOVSKY, to be represented by his own separate counsel.

3. Immediately thereafter, also on March 16, 2007, PHILIP J. NATHANSON advised defense counsel that this Motion to Withdraw would be filed and that the deposition dates previously scheduled for defendant and his associate should be cancelled pending the appearance of substitute counsel for co-plaintiff, WILLIAM CHOSLOVSKY.

4. In view of the foregoing, PHILIP J. NATHANSON cannot continue to represent the interests of co-plaintiff, WILLIAM CHOSLOVSKY, in the above captioned manner.

5. PHILIP J. NATHANSON will continue to represent the co-plaintiff, DAVID N. MISSNER, in this lawsuit.

WHEREBY, PHILIP J. NATHANSON AND THE NATHANSON LAW FIRM move this Honorable Court

to grant their Motion to Withdraw as attorneys for co-plaintiff, WILLIAM CHOSLOVSKY, *instanter*, pursuant to Supreme Court Rule 13.

PHILIP J. NATHANSON and
THE NATHANSON LAW FIRM

s/ Philip J. Nathanson
Philip J. Nathanson

PHILIP J. NATHANSON
THE NATHANSON LAW FIRM
120 North LaSalle Street
Suite 1000
Chicago, IL 60602
312-782-3322
312-782-4518 (FAX)

*Appendix F*

## AFFIDAVIT OF PHILIP J. NATHANSON

PHILIP J. NATHANSON certifies and states:

1. I am the plaintiff's attorney in the instant case.

2. The statements made in the foregoing motion are true and correct.

FURTHER AFFIANT SAITH NOT.

s/ Philip J. Nathanson
Philip J. Nathanson

## CERTIFICATION

PHILIP J. NATHANSON, pursuant to section 1-109 of the Illinois Code of Civil Procedure, certifies that he has read and reviewed the statements and allegations contained in the above and foregoing MOTION and AFFIDAVIT; that he has knowledge pertaining to the statements and allegations that are set forth in that MOTION and AFFIDAVIT; and that the statements and allegations made therein are true and correct.

s/ Philip J. Nathanson
Philip J. Nathanson

*Appendix F*

## CERTIFICATE OF SERVICE

PHILIP J. NATHANSON, an attorney, certifies that he served the above and foregoing Motion to Withdraw on all defense counsel of record by causing copies to be e-mailed, and mailed to such counsel, on March 19, 2007, by depositing same in the U.S. Mail slot at 120 N. LaSalle Street, Chicago, IL, on this date.

s/ Philip J. Nathanson
Philip J. Nathanson

## APPENDIX G — MEMORANDUM IN SUPPORT OF DEFENDANT ROBERT A. CLIFFORD'S COMBINED MOTION TO DISMISS THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO 735 ILCS § 5/2-619.1 DATED FEBRUARY 20, 2007

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

No. 06 L 012632

Calendar H

DAVID N. MISSNER and
WILLIAM CHOSLOVSKY,

Plaintiffs,

v.

ROBERT A. CLIFFORD,

Defendant.

### MEMORANDUM IN SUPPORT OF DEFENDANT ROBERT A. CLIFFORD'S COMBINED MOTION TO DISMISS THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT PURSUANT TO 735 ILCS § 5/2-619.1

Now comes defendant Robert A. Clifford, and for his memorandum of law in support of his combined motion to dismiss the plaintiffs' complaint and for

summary judgment in his favor as to all of the relief sought against him pursuant to 735 ILCS § 5/2-619.1, respectfully states as follows:

## INTRODUCTION

Plaintiffs David N. Missner and William Choslovsky have taken umbrage at the publication of two newspaper articles that summarized the allegations of a lawsuit brought against them and a host of other defendants. Unfortunately for plaintiffs, Mr. Clifford did not make, or was even aware of, the statements of which plaintiffs complain. Moreover, the statements of which plaintiffs complain are non-actionable, no matter what their source, because they are (1) protected by the "fair report" privilege; (2) subject to an innocent construction; and (3) constitutionally protected as opinion.

## STATEMENT OF FACTS

Plaintiffs plead a single count of defamation *per se*. They allege that Mr. Clifford made several statements to *The Chicago Tribune* and *The Chicago Daily Law Bulletin* concerning plaintiffs' representation of a businessman named Nicholas Betzold, Jr. in a Chapter 11 bankruptcy proceeding. (Exhibit A, Compl. ¶ 10.) Mr. Clifford, however, did not make any statements about plaintiffs to any newspaper representative. (*See* Exhibit C, Affidavit of Robert A. Clifford ¶ 2; Exhibit D, Affidavit of Pamela S. Menaker ¶¶ 5-6.)

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The statements of which plaintiffs complain originate from the allegations of a Verified Amended Complaint filed on December 6, 2005 by attorney Michael Ficaro against Mr. Betzold; plaintiffs; plaintiffs' law firm, DLA Piper US LLP; Larry Levin, another one of Betzold's attorneys; Mr. Levin's law firm, Funkhouser, Vegosen, Liebman & Dunn; and a Jane and John Doe (the "Ficaro Verified Amended Complaint") (*See* Exhibit B, Ficaro Compl.) The complaint was filed in the action *Ficaro v. Betzold, et al.*, Circuit Court of Cook County, 05 L 8474. Mr. Ficaro was represented in that action by Mr. Clifford's firm, Clifford Law Offices, P.C. (*Id.*) The complaint was verified by Mr. Ficaro and signed by Richard F. Burke, Jr., an attorney associated with Clifford Law Offices, P.C. (*Id.*)

In his complaint, Mr. Ficaro alleged that he represented Mr. Betzold's opponents in an arbitration proceeding. (*See* Exhibit B, Ficaro Compl. ¶ 20, 28; Exhibit A, Compl. ¶ 8.) He further alleged that the defendants had made defamatory statements about him, including by filing in the bankruptcy proceeding the forged affidavit of a former FBI agent named Francis N. Marrocco (Exhibit B, Ficaro Compl. ¶¶110-113; ¶ 206.)

On December 6, 2005, Pamela S. Menaker, another attorney associated with Clifford Law Offices, P.C., received a proposed draft press release summarizing the allegations of the Ficaro Verified Amended Complaint filed on December 6, 2005 from the offices of Ungaretti & Harris (Mr. Ficaro's firm). (Exhibit D,

Menaker Aff. ¶ 3.) That proposed draft press release is attached as Exhibit E.

Ms. Menaker did not forward the proposed press release to Mr. Clifford, who was out of town from December 3, 2005 until December 9, 2005. (Exhibit C, Clifford Aff. ¶ 3; Exhibit D, Menaker Aff. ¶ 5.) Instead, she discussed the press release with Mr. Ficaro and Mr. Burke, made minor edits to it, and forwarded it to *The Chicago Tribune* later on December 6, 2005. (Exhibit D, Menaker Aff. ¶ 3.) The press release that Ms. Menaker forwarded to *The Chicago Tribune* is attached as Exhibit F and reads, in full:

> Statement of Robert A. Clifford in response to the filing of the Amended Complaint before Judge Donald Suriano in Ficaro v. Betzold, et al., No. 5 L 8474:
>
> As set forth in detail in an Amended Complaint filed in the Cook County Circuit Court today (Tuesday, Dec. 6, 2005), Mike Ficaro has been defamed and greatly wronged as a result of intentional [sic] false and scurrilous statements made public by the defendants in an attempt to improperly influence the outcome of some vigorously contested corporate litigation involving tens of millions of dollars.
>
> The Amended Complaint alleges that one or more of the defendants forged the signature

> of an ex-FBI agent to a fictitious [sic] created false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.
>
> The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit. Mike Ficaro is a highly experience [sic] former prosecutor and civil litigator who has enjoyed an impeccable reputation both professionally and personally throughout his long career. We know that he will be vindicated in the court of law.

(Exhibit F, Press Release.) Ms. Menaker has no record or recollection of forwarding the release to *The Chicago Daily Law Bulletin*. (Exhibit D, Menaker Aff. ¶ 4.)

On December 8, 2005, *The Chicago Tribune* and *The Chicago Daily Law Bulletin* published articles that discussed the Ficaro Verified Amended Complaint and quoted from the press release that Ms. Menaker had forwarded to *The Chicago Tribune*. (Exhibit G, *Tribune* Article; Exhibit H, *Law Bulletin* Article.) A comparison of plaintiffs' complaint with those newspaper articles demonstrates that the statements of which plaintiffs complain are the very statements that the articles quoted from the press release.

Ms. Menaker did not speak to Mr. Clifford about the press release she forwarded to *The Chicago Tribune* at any time until this suit was filed against him. (Exhibit D, Menaker Aff. ¶ 5.) Neither did Mr. Clifford see, read, receive, nor have read to him the press release nor communicate with any newspaper representatives about the Ficaro Verified Amended Complaint. (Exhibit C, Clifford Aff. ¶¶ 2, 4).

## ARGUMENT

Defendant first moves for summary judgment in his favor as to all the relief sought against him pursuant to 735 ILCS § 5/2-1005 on the ground that he did not publish, or cause to be published, the statements of which plaintiffs complain, as supported by the affidavits presented herewith. In the alternative, defendant moves for the dismissal of the complaint pursuant to 735 ILCS § 5/2-619(a)(9), relying on the affirmative matter of the press release and the Ficaro Verified Amended Complaint. When the statements of which plaintiffs complain are examined in the context in which they were actually published, it becomes evident that they are 1) non-actionable under the "fair report" privilege; 2) subject to an innocent construction; and 3) constitutionally protected as opinion.

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## I. DEFENDANT SHOULD BE GRANTED SUMMARY JUDGMENT PURSUANT TO 735 ILCS § 5/2-1005 BECAUSE THERE IS NO QUESTION THAT HE DID NOT PUBLISH, OR CAUSE TO BE PUBLISHED, THE PURPORTEDLY DEFAMATORY STATEMENTS

Pursuant to 735 ILCS § 2-1005, summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." 735 ILCS § 2-1005(c). Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment. *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744 (1st Dist. 2004).

To state a defamation claim, a plaintiff must show that the defendant made a false statement about the plaintiff and made an unprivileged publication of that statement to a third party. *Solaia Tech., LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). At the very least, a defendant must "cause or participate in the publication" of a defamatory statement in order to be liable for defamation. *See Van Horne v. Muller*, 185 Ill. 2d 299, 308 (1998). *See also Walsh v. City of Chicago*, 712 F. Supp. 1303, 1311 (N.D. Ill. 1989) (awarding summary judgment to defendants where

plaintiff "failed to submit any evidence that they caused dissemination" of the allegedly defamatory information).

Plaintiffs cannot show that defendant caused or participated in the publication of a statement about them. The affidavits presented herewith establish that defendant had nothing to do with the publication of the press release containing the statements of which plaintiffs complain. Defendant avers that he "did not see, read, receive, or have read to [him] the draft Press Release or the Press Release sent to the *Chicago Tribune*" and that he did not have any "discussions or communications of any kind at any time with representatives of any newspaper about the allegations of the [Ficaro] Verified Amended Complaint. . . ." (Exhibit C, Clifford Aff. ¶¶ 2, 4). Instead, Defendant's colleague Ms. Menaker avers that *she* received the draft press release, discussed it with Mr. Ficaro and Mr. Burke, edited it, and forwarded it to *The Chicago Tribune*—all without informing defendant. (Exhibit D, Menaker Aff. ¶¶ 3, 5). Therefore, plaintiffs' allegations are demonstrably false, and there can be no question that defendant did not cause or participate in the publication of any statements about plaintiffs. Defendant respectfully asks the Court to grant summary judgment in his favor with respect to all the relief sought against him by plaintiffs' complaint.

## II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO 735 ILCS § 5/2-619(a)(9) BECAUSE THE STATEMENTS COMPLAINED OF BY PLAINTIFFS ARE NON-ACTIONABLE UNDER THE "FAIR REPORT" PRIVILEGE

A motion brought under 735 ILCS § 2-619 "affords a means of obtaining a summary disposition of issues of law or of easily proved issues of fact. . . ." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993) (internal citations omitted). A section 2-619(a)(9) motion to dismiss "admits the legal sufficiency of the plaintiff's cause of action" but presents other affirmative matter avoiding the legal effect of or defeating the claim. *Id.* In support of his motion to dismiss plaintiffs' complaint, Defendant raises the affirmative matter of the press release and the Ficaro Verified Amended Complaint.

It is well-established under Illinois law that "[a] defamatory statement is not actionable if it is privileged. . . ." *Solaia Tech., LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 585 (2006). One such privilege is the "fair report" privilege, which protects "[t]he publication of defamatory matter concerning another in a report of an official action" so long as "the report is accurate and complete or a fair abridgement of the occurrence reported." *Id.* (quoting Restatement (Second) of Torts § 611). The privilege's purpose is to serve "the public's interest in official proceedings, including judicial proceedings." *Id.* The privilege encompasses the

publication of a "fair abridgement" of a filed complaint. *Id.* at 589-90. As the Illinois Supreme Court held recently, the privilege overcomes even allegations of intentional defamation. *Id.* at 587.

To constitute a "fair abridgement," a report must convey to readers "a substantially correct account" of the complaint. *Id.* at 590. To determine whether this standard is met, a court must decide "if the sting of the defamatory statement in the proceeding is the same as the sting of the defamatory statement in the report." *Id.*; *see also id.* at 592 (holding that a report constituted a fair abridgement of a portion of a complaint because the report "simply borrow[ed] words from [the] complaint"); *Tepper v. Copley Press, Inc.*, 308 Ill. App. 3d 713, 720 (2d Dist. 1999) (holding that an abridgement need not be "an exact reproduction" of an official report, only a "sufficiently fair and accurate summary" containing no material differences from the report).

In this case, the press release is a fair abridgement of the complaint. Indeed, the press release is a very tempered summary of the Ficaro Verified Amended Complaint. A comparison of the press release with the complaint demonstrates that the press release fairly conveys the gist of the complaint without adding any extraneous material. For example, the first paragraph of the press release states that:

> As set forth in detail in an Amended Complaint filed in the Cook County Circuit Court today (Tuesday, Dec. 6, 2005), Mike

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> Ficaro has been defamed and greatly wronged as a result of intentional [sic] false and scurrilous statements made public by the defendants in an attempt to improperly influence the outcome of some vigorously contested corporate litigation involving tens of millions of dollars.

As the press release's very first sentence makes clear, its purpose is to summarize the allegations of the Ficaro Verified Amended Complaint. That it does, in that the gravamen of Mr. Ficaro's complaint is that he was defamed by intentionally false statements that were made public by the named defendants in an attempt to "extort" or influence Mr. Ficaro and his firm into settling the arbitration against Mr. Betzold. See, for example:

> -- ¶ 207 of the Ficaro Verified Amended Complaint: alleging "intentional defamation" against all defendants and alleging that information disseminated by the defendants "caused [Mr. Ficaro] *to be defamed, and maligned and damaged [his] personal and professional reputation*" (emphasis added);
>
> -- ¶ 209 of the Ficaro Verified Amended Complaint: stating that "The aforesaid *intentional and malicious acts* of [defendants] proximately caused [Mr. Ficaro] to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities." (emphasis added);

> -- ¶¶ 2-4 of the Ficaro Verified Amended Complaint: alleging that the named defendants "*threatened to defame Plaintiff Ficaro, . . . unless Plaintiff Ficaro forced his clients to drastically reduce the money damages the clients were about to receive from an arbitration award against Defendant Betzold.*"; that "Defendants followed through on their threats"; and that defendants, "in continuation of their plan," also leaked defamatory materials concerning Mr. Ficaro to the news media; and
>
> -- ¶ 44 of the Ficaro Verified Amended Complaint: alleging that the defendants' plan "meets the elements of Hobbs Act extortion."

The press release's first paragraph is obviously a much shortened version of the sixty-seven-page Ficaro Verified Amended Complaint, but just as it purports to—it accurately communicates the—complaint's gist, with no material differences. If anything, the press release's "sting" is lighter than that of the complaint, because it does not provide the same detail as the complaint does. Therefore, the first paragraph constitutes a fair abridgement of the Verified Amended Complaint.

So, too, does the press release's second paragraph, which reads:

> The Amended Complaint alleges that one or more of the defendants forged the signature

> of an ex-FBI agent to a fictitious [sic] created false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.

As the paragraph's introduction, "[t]he Amended Complaint alleges," indicates, these sentences are virtually cribbed from the Ficaro Verified Amended Complaint. See, for example:

> -- ¶ 110 of the Ficaro Verified Amended Complaint: alleging that "[O]ne or more of the Defendants prepared the false and defamatory content of the forged affidavit and placed Marrocco's signature on the document without Marrocco's knowledge or authorization in the furtherance of this fraudulent scheme.";
>
> -- ¶ 113 of the Ficaro Verified Amended Complaint: alleging that "The forged Marrocco affidavit was filed separately [in the bankruptcy court].": and
>
> -- ¶ 115 of the Ficaro Verified Amended Complaint: alleging that "[T]he intent in forging the alleged Marrocco affidavit and in filing it was to perpetrate a fraud on the court and the parties as part of the previously threatened extortion scheme, so as to avoid

> completion of the arbitration process that would have resulted in an award of twelve to fifteen million dollars in damages against Defendant Betzold and in favor of Plaintiff Ficaro's clients."

In support of its claim of "extortion," the Ficaro Verified Amended Complaint also alleges that one of the plaintiffs here, David N. Missner, left a voicemail for Mr. Ficaro's law partner, Gary Levenstein. According to the Ficaro Verified Amended Complaint, the voicemail allegedly stated:

> Gary, it's David Missner, 368-2170, Cell Phone is 847-804-0483. Home number is 773-327-7252 and I'm, I, got in my hands, some affidavits that have just about knocked me off my chair involving both the judge and Michael Ficaro and their connections with some bad people. ***These affidavits were obtained, I guess, in attempt to convince parties that, this, this arbitration was not anything but a fix, if you will and the people that we represent are obviously pretty desperate and are prepared to do just about anything to straighten this thing out***, so, I can't show you these affidavits but I can assure you that I have them. The originals are in the hands of counsel at the Company and this is really unbelievable stuff, I've never really been associated with anything like this in my life so I, I don't exactly know how to proceed other

> than to say I, I know that people have been talking settlement and I, I think that is a good thing, um, and I'm, ***I suppose this could be interpreted as leverage that, that they better settle or you know, or what kind of thing and I guess you could look at it that way but that's not really, I mean, you know, like this guy really wants to file bankruptcy, man, I don't think so but if he does then these affidavits would be filed and they would be public and it would be unbelievable and I don't think it would be good for um, the firm that Mr. Ficaro works for either***. You know obviously once it public, it's public so, it's big time publicity shit. Okay? So you got all my numbers, call me, we're not doing anything, I'm not going to do anything without hearing from you, talking to you and figure out what is going on, unfortunately it's the weekend. That's what I got to say. Bye.

(Exhibit B, Ficaro Compl. ¶ 68) (emphasis added).

As in *Solaia Technology*, the press release merely borrows words from the complaint, and therefore its publication is protected by the fair report privilege. *Solaia Tech.*, 221 Ill.2d at 592.

Finally, the press release's final paragraph states that:

> The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond

> to the highly derogatory and defamatory statements that are completely without merit. Mike Ficaro is a highly experience [sic] former prosecutor and civil litigator who has enjoyed an impeccable reputation both professionally and personally throughout his long career. We know that he will be vindicated in the court of law.

The paragraph provides complimentary statements about Mr. Ficaro and expresses a generalized confidence in the rightness of his cause, but, with regard to his complaint, only reiterates the statements of the first paragraph—that defamatory and damaging statements were made about Mr. Ficaro. As such, the paragraph is simply restating the gist of the Ficaro Verified Amended Complaint and, as with the rest of the press release, its publication is protected under the fair report privilege. Therefore, defendant respectfully asks the Court to dismiss with prejudice plaintiffs' complaint pursuant to 735 ILCS § 5/2-619(a)(9), because the fair report privilege prevents plaintiffs from stating any cause of action with respect to the press release.

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## III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE PURSUANT TO 735 ILCS § 5/2-619(a)(9) BECAUSE THE STATEMENTS ALLEGED TO BE DEFAMATORY *PER SE* ARE SUSCEPTIBLE TO AN INNOCENT CONSTRUCTION

Plaintiffs allege that the statements of the press release that were quoted in the newspaper articles are defamatory *per se.* Even if the Court were to conclude that defendant did publish these statements, and that they were not protected by the "fair report" privilege, plaintiffs' claim would still be subject to dismissal pursuant to 735 ILCS § 5/2-619(a)(9) because the statements are non-actionable under the Illinois doctrine of "innocent construction." In support of its motion, defendant presents the press release as "other affirmative matter avoiding the legal effect of or defeating" plaintiffs' claim.

Plaintiffs allege one count of defamation *per se.* A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face. *Tuite v. Corbett*, 2006 WL 3742112, at *4 (Ill. Dec. 21, 2006). In that case, injury to the plaintiff's reputation is presumed. *Id.* In Illinois, there are five categories of statements that are defamatory *per se:* 1) statements imputting the commission of a crime; 2) statements imputing infection with a loathsome communicable disease; 3) statements imputing an inability to perform or want of integrity in performing employment duties; 4) statements imputing a lack of ability or that otherwise

prejudice a person in his or her profession or business; and 5) statements imputing adultery or fornication. *Id.* at *5. Conversely, if a statement's defamatory character is not obvious and apparent on its face, the plaintiff must establish a claim for defamation *per quod* and plead and prove special damages in order to recover. *Id.* at*4.

Even if a statement may reasonably be interpreted to fall within one of the *per se* categories, however, it is nevertheless not actionable as defamation *per se* if it is also reasonably capable of an "innocent construction." *Id.* at *5. Under this well-established tenet of Illinois law, a court presented with a purportedly defamatory *per se* statement is to consider the statement in its context and to determine, as a matter of law, whether "the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff. . . ." *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). If so, the statement is not actionable *per se*. *Id.* Here, the press release is subject to a number of innocent constructions.

### A. THE PRESS RELEASE MAY BE INNOCENTLY INTERPRETED AS "AN ATTORNEY'S BIASED PRESENTATION OF HIS CLIENT'S VIEW OF A PENDING CAUSE OF ACTION"

Generally, "[t]he repetition of an imputation made by a third person is actionable although the defamer attributes the charge to a third person." *Snitowsky v.*

*NBC Subsidiary (WMAQ-TV), Inc.*, 297 Ill. App. 3d 304, 310 (1st Dist. 1998) (internal citations omitted). However, the Illinois Supreme Court in *Owen v. Carr*, 113 Ill. 2d 273 (1986) identified "an important qualification" to that general rule. *Snitowsky*, 297 Ill. App. 3d at 311. In *Owen*, the court held that, where an attorney summarized the allegations of his client's complaint in an interview with a magazine writer, the statements could be innocently interpreted as merely allegations "to be proved at the trial of the complaint," and could not be considered defamatory *per se*. *Owen*, 113 Ill.2d at 279. Because the attorney's statements clearly constituted "an attorney's biased presentation of his client's view of a pending cause of action," the Court held that they could be construed in a non-defamatory manner. *Id.* at 280.

Here, the press release utilizes language ("As set forth in detail in an Amended Complaint"; "The Amended Complaint alleges. . . .") that indicates the press release serves to present the allegations of the Ficaro Verified Amended Complaint as allegations to be proved at trial. Therefore, as in *Owen*, the press release may be innocently interpreted as "an attorney's biased presentation of his client's view of a pending cause of action." *Id.* Because the press release may be innocently interpreted, it is not, as plaintiffs allege, actionable *per se*. *See Chapski*, 92 Ill. 2d at 352. Defendant respectfully asks the Court to dismiss plaintiffs' complaint with prejudice pursuant to 735 ILCS § 5/2-619(a)(9).

## B. THE PRESS RELEASE'S STATEMENTS MAY REASONABLY BE INTERPRETED AS REFERRING TO SOMEONE OTHER THAN THE PLAINTIFFS

A statement is not actionable as defamatory *per se* if it may "reasonably be interpreted as referring to someone other than the plaintiff." *Chapski v. Copley Press*, 92 Ill.2d 344, 352 (1982). The press release's statements may reasonably be interpreted to refer to someone other than plaintiffs here for two reasons. First, the press release on its face does not refer to any individuals by name, so, under Illinois law, it cannot be defamatory *per se* to any particular individual. Second, even if that impediment were removed, the language of the press release cannot be read to clearly refer to any particular member of the group of defendants named in the Verified Amended Complaint.

### 1. THE PRESS RELEASE DOES NOT IDENTIFY ANY INDIVIDUALS BY NAME, AND THEREFORE CANNOT BE ACTIONABLE *PER SE*

A statement that does not refer to a plaintiff by name is not defamatory *per se* to him or her because extrinsic evidence is required to demonstrate that the statement is actually referring to the plaintiff. *Moore v. Streit*, 181 Ill. App. 3d 587, 597 (Ill. App. 1st Dist. 1989) ("[I]f an individual is not named in defamatory material, the material is not defamatory *per se* as to that person") (citing *Colucci v. Chicago Crime Comm'n*, 31 Ill. App.

3d 802 (1975)); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 327 (1st Dist. 1999) (holding that allegedly defamatory article that did not identify plaintiffs by name was not actionable *per se* because "only statements that are defamatory *per quod* may rely on extrinsic facts.").

In the recent First District case, *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 367 Ill. App. 3d 48, 49-50 (1st Dist. 2006), *cert. granted* __ N.E.2d __ (Ill. Nov. 29, 2006), for example, the defendant published an advertisement derogatorily referring to an "Empire rags center" run by "Cy and his son Paul." The Plaintiffs, Cyril and Paul Rosengarten, operated a business named Imperial Apparel. *Id.* at 51. The court applied *Chapski* and held that "[b]ecause the statements in [the advertisement] do not refer to Imperial by name or give the last names of the individual plaintiffs, they could reasonably be interpreted as referring to someone other than the plaintiffs"—specifically, a hypothetical entity named Empire owned by two individuals named Cy and Paul. *Id.* at 57-58. Therefore, the court concluded, the statements were not actionable *per se*. *Id.* at 58.

Here, the press release only refers to "the defendants"; "one or more of the defendants"; and "attorneys". Reading the press release alone, then, it is impossible to interpret it as referring to any particular individual. Indeed, the connection between plaintiffs and the unnamed individuals described in the press release is even more attenuated than the connection between

plaintiffs in *Imperial Apparel* and the individuals referenced in the advertisement of which they complained. In *Imperial Apparel*, the purportedly defamatory advertisement referred to two individuals by their first names and a similar business's name. Here, by contrast, there are no details on the face of the press release that could be used to identify the plaintiffs individually.

Only by reference to the Ficaro Verified Amended Complaint could plaintiffs argue that they were referenced by the press release. A statement is ***only*** defamatory *per se* if its defamatory character is obvious and apparent on its face. *Tuite v. Corbett*, 2006 WL 3742112, at *4 (Ill. Dec. 21, 2006). Therefore, plaintiffs cannot state a claim for defamation *per se*. Defendant respectfully asks the Court to dismiss plaintiffs' complaint with prejudice pursuant to 735 ILCS § 5/2-619(a)(9).

### 2. THE PRESS RELEASE'S LANGUAGE CANNOT BE INTERPRETED AS CLEARLY IMPUTING PLAINTIFFS WITH ANY DISREPUTABLE CONDUCT

Even if this Court were to hold that the press release could be read in conjunction with the Ficaro Verified Amended Complaint to show that plaintiffs were among those named in Mr. Ficaro's suit, the press release would still be subject to an innocent construction. The innocent construction rule requires the interpreting court to

consider the allegedly defamatory statements in the context in which they were published. *Solaia Tech., LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 580 (2006). When the statements complained of by plaintiffs are considered in the context of the press release in which they were published, it becomes evident that they may be innocently construed as not imputing any particular individual, including plaintiffs, with any illegal or disreputable conduct.

The press release's first paragraph states that:

> Mr. Ficaro has been defamed and greatly wronged as a result of intentional [sic] false and scurrilous statements made public by the defendants in an attempt to improperly influence the outcome of some vigorously contested corporate litigation . . . .

The statement does not indicate what "statements" were made public by defendants. Neither does it necessarily indicate that the "defendants" who publicized the statements knew them to be false—just that the statement itself was originally intentionally false. Moreover, there is no necessary implication that all of the defendants had an intent to "improperly" influence the outcome of the litigation. *See Crosby v. Time, Inc.*, 254 F.2d 927, 928-30 (7th Cir. 1958) (holding that statement that "top Western officials of the [Teamsters] were conspiring with gamblers" not actionable under the innocent construction rule without showing that the statement accused all of such officials of wrongdoing).

The second paragraph, in fact, renders more likely the reading that only an unidentified subset of the defendants actually knew the unidentified "statements" to be false and intended to use them improperly, since it only identifies "one or more of the defendants." The paragraph states:

> The Amended Complaint alleges that one or more of the defendants forged the signature of an ex-FBI agent to a fictitious [sic] created false and untrue affidavit filed in the federal court proceeding. The complaint further alleges that the affidavit was intended to extort Ficaro and his law firm into settling the litigation by selling out their clients.

The Ficaro Verified Amended Complaint names as defendants not only the plaintiffs here, but also Betzold; an attorney, Levin; a Jane and John Doe; and the entirety of two law firms, which include over 1400 attorneys.[1] As such, the second paragraph's statement that "one or more of the defendants" forged the signature to a false affidavit is subject to the innocent interpretation that a group of one or more defendants named in the Ficaro complaint *not including either of the plaintiffs* was responsible for a) forging the affidavit and b) intending that it be used improperly. Indeed, if

1. As of February 8, 2007, Funkhouser, Vegosen, Liebman & Dunn's website indicated that fifteen attorneys are associated with the firm. DLA Piper US LLP's website indicated that over 1400 attorneys are associated with the firm.

only an unidentified subset of the defendants named in the Ficaro Verified Amended Complaint knew whether the affidavit was forged or not, it is reasonable to assume from the press release that those defendants would be the only ones who would know that the affidavit's use would be improper. The third paragraph merely reiterates the first paragraph's statement that some unidentified individuals caused the complained-of statements about Mr. Ficaro to be published. Again, the level of culpability among those "attorneys" is not discussed.

In short, then, the press release may reasonably be interpreted as alleging that "one or more of the defendants" named in the Ficaro Verified Amended Complaint not including the present plaintiffs forged the affidavit of an ex-FBI agent with an intent to improperly influence litigation. Then, some—though perhaps not all—"defendants" or "attorneys" publicized the affidavit. However, only those defendants responsible for forging the affidavit knew that it was false—and therefore knew that its use in litigation would be "improper".

Under this reading, the press release does not specifically implicate any particular individual in any illegal or disreputable behavior. Certainly those individuals who forged the affidavit are imputed with disreputable conduct. However, the press release does not identify with any certainty whom those individuals might be. As to those individuals who did not know of the affidavit's inauthenticity, and did not know that its

use would be improper, there is no imputation of any unprofessional or illegal conduct. Since it is plausible to identify plaintiffs here as among the innocent, the press release should be innocently interpreted as to them, and therefore it cannot be actionable *per se*. Therefore, defendant respectfully asks the Court to dismiss plaintiffs' complaint with prejudice pursuant to 735 ILCS § 5/2-619(a)(9).

## IV. PLAINTIFFS' COMPLAINT SHOULD BE ALSO DISMISSED WITH PREJUDICE PURSUANT TO 735 ILCS § 5/2-619(a)(9) BECAUSE THE PRESS RELEASE'S STATEMENTS ARE PROTECTED EXPRESSIONS OF OPINION

The First Amendment supplies an additional basis on which to dismiss plaintiffs' complaint with prejudice. Statements of opinion are not actionable as defamatory because they are constitutionally protected. *Solaia Tech. v. Specialty Publishing Co.*, 221 Ill.2d 558, 581 (2006). As the Illinois Supreme Court has affirmed, "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)).

A defamatory statement is constitutionally protected if it cannot be reasonably interpreted as stating actual fact. *Id.* In making this determination, a

court is to consider "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content." *Id.*

Illinois courts have repeatedly held that statements that are not sufficiently precise do not contain verifiable facts, and therefore are protected as opinion. *See Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 762 (1st Dist. 2002) (holding that statement that plaintiff was "cheating the city" was too "broad, conclusory, and subjective to be objectively verifiable"); *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 328-30 (1st Dist. 1999) (discussed *infra); Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 519-20 (1st Dist. 1998) (holding that statement that plaintiff was "fired because of incompetence" was too "ambiguous and indefinite" to constitute statement of fact, in that "one person's idea of when one reaches the threshold of incompetence will vary from the next person's").

In *Dubinsky*, the plaintiffs, chairmen of an airline executive council, complained of an article which referred to them and stated that "we now have before us evidence of collusion, conspiracies, and behavior much more onerous than anything imagined by [previous chairmen]," as well as that two of the plaintiffs' motives should be questioned as to "whether they were entirely honorable." *Dubinsky*, 303 Ill. App. 3d at 328. Furthermore, the article stated that "some would prosecute [the plaintiffs] to the fullest extent of the law" for their conduct. *Id.* The court held that the comments

were not "objectively verifiable" or "sufficiently precise" so as to be interpreted as stating actual facts about the plaintiffs. *Id.*

As discussed above press release's publication is non-actionable under the fair report privilege and the rule of the innocent construction. The entire press release, but most especially the third paragraph, constitutes a protected expression of opinion. Specifically, the third paragraph's statement that "The conduct of these attorneys has forced Mr. Ficaro to file this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit" is insufficiently precise to constitute a statement of fact. First, the descriptors "highly derogatory" and "defamatory" are ambiguous and indefinite terms without a precise and readily understood meaning. As in *Hopewell*, the threshold of whether a statement is sufficiently insulting to be "derogatory" or "defamatory" varies from person to person. Second, the statement, as in *Dubinsky*, is not "sufficiently precise" so as to be verifiable. It is not clear to what "conduct" and to what "statements" the press release is referring. Third, the statement's literary context—a three-paragraph summation of the sixty-seven-page Ficaro Verified Amended Complaint—makes clear that the statement cannot be considered as stating any fact with sufficient clarity, without further reference to the complaint's allegations.

Therefore, the press release's statement that "The conduct of these attorneys has forced Mr. Ficaro to file

this lawsuit in order to respond to the highly derogatory and defamatory statements that are completely without merit" is a constitutionally protected expression of opinion. To the extent that plaintiffs seek to state a cause of defamation based upon it, defendant respectfully asks the Court to dismiss plaintiffs' complaint with prejudice pursuant to 735 ILCS § 5/2-619(a)(9).

## APPENDIX H — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED NOVEMBER 25, 2009

**SUPREME COURT OF ILLINOIS**
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 25, 2009

Mr. Charles D. Tobin
Holland & Knight LLP
2099 Pennsylvania Ave NW, Suite 100
Washington, DC 20006-6801

No. 109007 - David N. Missner, respondent, v. Robert A. Clifford, petitioner. Leave to appeal, Appellate Court, First District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Fitzgerald, C.J., took no part.

The mandate of this Court will issue to the Appellate court on December 30, 2009.

# APPENDIX I — CONSTITUTIONAL PROVISIONS

## First Amendment

Freedom of Religion, Press, Expression.
Ratified 12/15/1791

Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

## 14th Amendment

Citizenship Rights.
Ratified 7/9/1868

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# APPENDIX J — RESTATEMENT OF THE LAW OF TORTS

Restatement (Second) of Torts § 611 (1977)

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through June 2009

Division 5. Defamation
Chapter 25. Defenses To Actions For Defamation
Topic 3. Conditional Privileges
Title C. Special Types Of Privilege

## § 611. Report Of Official Proceeding Or Public Meeting

**The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.**

**Comment:**

*a. Character of privilege.* The privilege of the publication of reports of defamatory statements covered in this Section is not an absolute privilege. It is, however, somewhat broader in its scope than the conditional privileges covered in §§ 594 to 598A. The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings. The privilege is therefore one of general publication and is not limited

to publication to any person or group of persons. For the same reason the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding. (On this see Comment *f*).

*b.* Relationship of this privilege to the constitutional requirement of fault. The Constitution is now held to require the plaintiff in an action for defamation to show that the defendant, in publishing a false and defamatory communication concerning him, was at fault regarding the injurious character of the statement. If the plaintiff is a public official or a public figure, he must show that the defendant knew of the falsity and defamatory character of the statement or acted with reckless disregard toward these aspects of the statement. (See § 580A). If the plaintiff is a private person, he must show the existence of fault amounting at least to negligence in regard to the falsity and the defamatory character of the statement. (See § 580B). The privilege stated in this Section permits a person to publish a report of an official action or proceeding or of a public meeting that deals with a matter of public concern, even though the report contains what he knows to be a false and defamatory statement. The constitutional requirement of fault is met in this situation by a showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgment. The distinction as to the measure of fault as set forth in §§ 580A and 580B is applicable to the requirement of fault for this purpose, too.

*Appendix J*

If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy. As to the right of privacy, see § 652D.

* * *

*c. Who may exercise the privilege.* The privilege stated in this Section is commonly exercised by newspapers, broadcasting stations and others who are in the business of reporting news to the public. It is not, however, limited to these publishers. It extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public.

* * *

*d. Official proceedings.* The privilege covered in this Section extends to the report of any official proceeding, or any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivisions. Since the holding of an official hearing or meeting is in itself an official proceeding, the privilege includes the report of any official hearing or meeting, even though no other action is taken. The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege.

The privilege is thus applicable to the report of proceedings before any court, whether it is one of general or of special and limited jurisdiction. It is also applicable to the proceedings of an agency of the court, such as a grand jury returning an indictment. It applies also to the report of any other proceedings, judicial in character, which take place before administrative, executive or legislative bodies, such as an extradition hearing before the governor of a State or an impeachment proceeding before a legislative body.

The privilege is further applicable to the report of any official proceeding or action of either house of the Congress of the United States or the legislative body of a State or the municipal council of a city, town or village. It is also applicable to public proceedings and actions of other bodies or organizations that are by law authorized to perform public duties, such as a medical or bar association charged with authority to examine or license or discipline practitioners.

It is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law.

*e. Necessity of official action in judicial proceedings.* A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section.

An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action. (See Comment *c*). It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that, in the normal progress of the proceeding, a final decision will be rendered. So too, the fact that the proceedings are ex parte rather than inter partes is immaterial if the matter has come officially before the tribunal and action has been taken in reference to it.

*f. Accuracy and fairness of report.* The rule stated in this Section requires the report to be accurate. It is not necessary that it be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.

Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a

newspaper report, qualification of which is found only in the text of the article. The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

It is not always necessary that the entire proceedings be reported at one time. However, when a newspaper publishes from day to day the report of a judicial proceeding, it may not, after reporting derogatory parts, fail to publish the further proceedings that tend to vindicate the person defamed. The fact that the report of one side of a trial is not as complete as that of the other side is a factor to be considered in determining whether the report, as a whole, is unfair.

*g. Proceedings in court that lacks jurisdiction.* The fact that a court whose proceedings are reported did not have jurisdiction over the subject matter or the person involved will not affect the existence of the privilege under the rule stated in this Section. This is true whether the lack of jurisdiction depends upon a constitutional or statutory provision or upon a rule of the common law.

*h. Arrest.* An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand

statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.

*i. Public meetings.* The privilege covered by this Section also extends to a report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern. As in the case of the report of official proceedings, the purpose of the privilege is to protect those who make available to the public information concerning public events that concern or affect the public interest and that any member of the public could have acquired for himself by attending them. The fact that admission is charged does not destroy the privilege so long as any one is free to pay it. On the other hand, the privilege does not extend to a report of a private meeting, not open to the general public, or to a report of a meeting that does not deal with matters of public concern, even though it is open to the public.

* * * *

## APPENDIX K — VERIFIED AMENDED COMPLAINT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, LAW DIVISION FILED DECEMBER 19, 2006

RAC/RFB/SMM 05-0101
STATE OF ILLINOIS )
)SS.
COUNTY OF COOK )

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION**

No. 05 L 8474

MICHAEL A. FICARO, Individually,

Plaintiff,

vs.

NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a/ LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY

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U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., JANE DOE and JOHN DOE,

Defendants.

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VANCE L. LIEBMAN, Individually, and as an Agent or Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD.,

Respondent in Discovery.

**VERIFIED**
**AMENDED COMPLAINT**

**VERIFIED AMENDED COMPLAINT AT LAW**

Plaintiff, MICHAEL A. FICARO, Individually (hereinafter referred to as "FICARO"), complaining of Defendants, NICHOLAS BETZOLD, JR., Individually (hereinafter referred to as "BETZOLD"), LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER (hereinafter collectively referred to as "LEVIN"), FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD. (hereinafter referred to as "FUNKHOUSER"), DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER

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RUDNICK L.L.P. (hereinafter referred to as "MISSNER"), WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., (hereinafter referred to as "CHOSLOVSKY"), DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P. (hereinafter referred to as "DLA"), and others, JANE DOE and JOHN DOE, as yet unidentified (hereinafter collectively referred to as "DOE"), states as follows:

**NATURE OF THE ACTION**

1. This is an action for abuse of process, intentional defamation, negligent defamation, intentional false light invasion of privacy, negligent false light invasion of privacy, malicious prosecution, violation of the Racketeer Influenced And Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, civil conspiracy, and tortious interference with prospective economic advantage.

2. In an effort to help Defendant BETZOLD retain tens of millions of dollars he unlawfully misappropriated from a company over which he exercised control to the detriment of other shareholders, Defendants threatened to defame Plaintiff, FICARO, an attorney of good name, fame, and reputation and deservedly held in the high esteem and favorable opinion of and by his clients, colleagues, acquaintances and the general public, as well as his law firm, unless Plaintiff FICARO forced his clients to drastically reduce the money damages the clients were about to receive from an arbitration award against Defendant BETZOLD.

3. Defendants followed through on their threats — made outside of the purview of judicial or quasi-judicial proceedings and not in furtherance of any judicial or quasi-judicial proceedings. In furtherance of their plan, one or more of the Defendants perpetrated fraud on the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, by forging the content and signature of an affidavit that, as described below, had no connection to or logical relation to any judicial or quasi-judicial proceedings but whose purpose was to damage Plaintiff FICARO's reputation and to defame him in order to execute their plan.

4. After preparing and filing the forged affidavit, Defendants, in continuation of their plan, republished the defamatory materials by leaking information concerning that affidavit and another highly inflammatory and defamatory affidavit to the news media and third parties not connected to any judicial or quasi-judicial proceedings.

5. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities. Plaintiff FICARO seeks compensatory, special and punitive damages (including treble damages, as appropriate), attorneys' fees, and costs in amounts to be established at trial.

*Appendix K*

## THE PARTIES

6. Plaintiff MICHAEL FICARO, on and before August 2, 2004 and at all relevant times, was an attorney of good name, fame, and reputation, practicing law in the City of Chicago, County of Cook, State of Illinois, and deservedly held in the high esteem and favorable opinion of and by his clients, colleagues, acquaintances and the general public.

7. Plaintiff FICARO has had a distinguished public service career that spanned almost two decades. Plaintiff FICARO served the State of Illinois and the Illinois public as an Assistant State's Attorney from 1972 to 1977, Chief of Felony Trial Division in the State's Attorney's office from 1978 to 1979, Deputy State's Attorney, Chief of Criminal Prosecution Bureau, from 1979 to 1981, Chief of Criminal Prosecutions and Trials in the Illinois Attorney General's Office from 1981 to 1985, Director of Enforcement in the Illinois Attorney General's Office from 1985 to 1987, Chief of the Charitable Trust Division in the Illinois Attorney Generalo's Office from 1987-1988, Executive Director in the Illinois Attorney General's Office from 1987 to 1988, and as the First Assistant Attorney General from 1988 to 1990.

8. Plaintiff FICARO was also appointed as Special Assistant, United States Attorney, for the Northern District of Illinois, from 1982 to 1984, was appointed Special Prosecutor by the Presiding Judge of the Criminal Division to investigate the State's Attorney of Cook County, from July 1990 to May 1992, and was appointed as Special Assistant, Illinois Attorney

General, Environmental Division, from 1989 to 1990, and Trial Division, 1989 to 1991.

9. Plaintiff FICARO served in each of these positions with distinction and earned the respect and admiration of his peers in those offices and positions in which he served the public.

10. Plaintiff FICARO has spent his career in public service and private practice upholding and enforcing the law.

11. On information and belief, Defendant BETZOLD is a resident of the State of Illinois. BETZOLD is being sued individually.

12. On information and belief, Defendant LEVIN is a resident of the State of Illinois. LEVIN is being sued individually and as an agent and employee of Defendant FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD. ("FUNKHOUSER").

13. On and before August 2, 2004, and at all relevant times, Defendant LEVIN was the agent, partner, shareholder, member and/or employee of Defendant, FUNKHOUSER, conducting business and practicing law in and throughout the City of Chicago, County of Cook, State of Illinois.

14. On and before August 2, 2004, and at all relevant times, Defendant FUNKHOUSER was a limited partnership, and/or a corporation, conducting business and practicing law in and throughout the City of Chicago, County of Cook, State of Illinois.

15. On and before August 2, 2004, and at all relevant times, Defendant DLA PIPER RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P. ("DLA") was a limited liability partnership, conducting business and practicing law in and throughout the City of Chicago, County of Cook, State of Illinois.

16. On and before August 2, 2004, and at all relevant times, Defendants MISSNER and CHOSLOVSKY, and each of them, were agents, partners, members and/or employees of Defendant DLA, conducting business and practicing law in and throughout the City of Chicago, County of Cook, State of Illinois. Defendants MISSNER and CHOSLOVSKY are being sued individually and as agents and employees of Defendant DLA.

17. Defendants JANE DOE and JOHN DOE are not yet identified. Defendants have named a Respondent in Discovery, VANCE L. LIEBMAN, individually, and as an Agent and Employee of FUNKHOUSER because LIEBMAN is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

18. On and before August 2, 2004, and at all relevant times, on information and belief, non-party Francis N.

Marrocco ("MARROCCO") was a former Federal Bureau of Investigation (FBI) Agnet assigned to the FBI's Chicago field office.

19. On or before August 2, 2004, and at all relevant times, on information and belief, non-party Robert J. Cooley ("COOLEY") was a former Chicago police officer and Illinois lawyer who admitted he had participated in multiple criminal operations with known members of organized crime in and throughout Cook County, Illinois, admitted he violated his oath as an attorney by buying and fixing cases, bribing judges and other court personnel, and admitted to otherwise subverting the judicial process.

## FACTS COMMON TO ALL COUNTS

### The Betzold Arbitration and Defendants' Significant Self-Interest in the Outcome

20. In October, 2002, Defendant BETZOLD filed a petition for arbitration against two of the three minority shareholders in what was then known as The Betzold Companies. Defendant BETZOLD later added the third minority shareholder to the arbitration proceedings.

21. Defendant BETZOLD owned slightly over 51% of the stock in The Betzold Companies and used that majority control to make payments of money to himself for personal loan payments, personal bank accounts, and related income tax liability. This was done to the detriment of the minority shareholders.

22. Defendant BETZOLD sought, in the arbitration, a declaratory judgment that his payments of money to himself were authorized under the shareholder's agreement between the shareholders.

23. Defendant LEVIN was a Board member, employee and legal advisor to The Betzold Companies during the arbitration.

24. Defendant LEVIN was one of the principal negotiators and drafters of the shareholder's agreement that was the subject of the arbitration.

25. Defendant LEVIN knew that if his interpretation of the shareholder's agreement was not upheld in favor of Defendant BETZOLD, Defendant LEVIN would be subject to the loss of his job and reputation and subject to potential legal malpractice liability. Defendant LEVIN's income derived from services to The Betzold Companies was in excess of $1.5 million dollars in 2003.

26. Attorneys at FUNKHOUSER assisted Defendant LEVIN, together with Defendant LEVIN, also were principally involved in the negotiation and drafting of the shareholder's agreement.

27. Attorneys at FUNKHOUSER also knew that if Defendant BETZOLD lost the arbitration, FUNKHOUSER would lose the representation of The Betzold Companies, lose its reputation in the community, and would face potential costly malpractice liability if

their interpretation of the shareholder's agreement was not upheld in the arbitration.

28. Plaintiff FICARO appeared in 2003 as legal counsel to the minority shareholders in the arbitration and tried the arbitration in March, 2004.

**Defendants Lose The Arbitration, With The Arbitrator Ruling That Defendant BETZOLD Took Improper Payments Of Over $25 Million**

29. After a three-day evidentiary hearing and a fourth morning including final arguments, the arbitrator ruled that Defendant BETZOLD's payments to himself for personal loan payments, personal bank accounts and related income tax liabilities were not authorized by the shareholders' agreement at issue in the arbitration.

30. Following his ruling on liability against Defendant BETZOLD and in favor of the minority shareholders, the arbitrator scheduled a second evidentiary hearing to determine the amounts Defendant BETZOLD and/or The Betzold Companies would have to pay the minority shareholders. The damages calculation provided that Defendant BETZOLD would pay $12.5 to 15 million for his misconduct.

31. Because they had deposed the minority shareholders' damages expert, Defendants knew that Defendant BETZOLD and The Betzold Companies risked facing an award of damages of between twelve and fifteen million dollars.

*Appendix K*

**Defendants Fail In Their Attempt To Remove The Arbitrator And To Delay The Damages Hearing**

32. Faced with a ruling that rejected their interpretation of the Shareholders' Agreement and all its attendant adverse consequences, Defendants BETZOLD, LEVIN, and FUNKHOUSER sought to vacate the order and to delay the upcoming damages hearing.

33. Defendants undertook a number of measures to further their goals.

34. Defendants BETZOLD, LEVIN, and Respondent in Discovery LIEBMAN sought to remove the arbitrator, former Circuit Court Judge Thomas Hett ("Judge Hett").

35. Defendants BETZOLD, LEVIN, and Respondent LIEBMAN sought to reverse the ruling, claiming that in Discovery Judge Hett erred in his ruling, filed a 60-plus page motion and sought to have it heard before proceeding to a damages hearing.

36. The arbitration was stayed pending resolution of allegations seeking removal of the arbitrator.

37. The gist of the allegations seeking to remove Judge Hett as arbitrator was that Plaintiff FICARO knew Judge Hett and that their "relationship" was inappropriate, undisclosed, and required Judge Hett's removal and a new trial.

*Appendix K*

38. After full briefing and hearing before an independent neutral selected by the Arbitration service, Defendant BETZOLD's attempt to remove Judge Hett as arbitrator was soundly rejected. The independent neutral found that Judge Hett had disclosed that Plaintiff FICARO had appeared before him in the past. The independent neutral found that the other allegations were too tenuous to support removal of Judge Hett as arbitrator.

39. After Defendant BETZOLD's attempt to remove Judge Hett as arbitrator was rejected, Judge Hett sought to move the case forward.

40. Defendant BETZOLD and The Betzold Companies sought to introduce new experts.

41. The gambit to delay the damages hearing ultimately failed and Judge Hett evidentually scheduled the damages hearing for August 3, 2004.

42. Throughout the aforementioned proceedings, Defendant BETZOLD attempted to induce a settlement with Plaintiff FICARO's clients but demanded the deal include not only resolution of the arbitration and related litigation, but their shares in The Betzold Companies as well. In other words, BETZOLD sought to gain the 49% interest in The Betzold Companies from the minority shareholders as part of a "two for the price of one deal" to BETZOLD's benefit and at the expense of the minority shareholders.

*Appendix K*

**Defendants Work on "Plan B" In The Event Their Efforts To Remove Judge Hett As Arbitrator Fail**

43. During the time period in which Defendants sought to remove Judge Hett and obtain a new hearing, one or more of the Defendants formulated a "Plan B" — an alternative strategy born of desperation and to be launched as a last resort if Defendants' efforts to undo the arbitration ruling on liability or derail the damages hearing failed.

44. The Plan B strategy involved at least three components: (1) Defendant BETZOLD filing a Chapter 11 bankruptcy to stay the damages hearing, (2) a plan to retry the arbitration in bankruptcy court, and (3) a plan to try to embarrass Plaintiff FICARO and use the threat of such embarrassment to induce him and/or his law partners to sell out their clients by convincing their clients to settle the arbitration with Defendant BETZOLD on terms less favorable to Plaintiff FICARO's clients than they would have received otherwise after a damages hearing. This plan meets the elements of Hobbs Act extortion because it: (a) affected and attempted to affect interstate commerce directly and indirectly through the wrongful use of fear of economic harm to Plaintiff FICARO and his law firm (both conducting their law business in interstate and foreign commerce) by (b) threatening to damage the reputation of Plaintiff FICARO as a law abiding professional and creating and attempting to create the false appearance, through forgery and false statements, that Plaintiff, FICARO, was an associate of organized

crime (c) in order to cause Plaintiff FICARO and his law firm to fear that the public, clients, potential clients and others would conclude, form the opinion that, and ponder whether Plaintiff FICARO was a corrupt person and a corrupt law enforcement official during the time he was involved in public services as a state prosecutor and official of the Illinois Attorney General's Office, and (d) thereby obtain a thing of value, namely Plaintiff FICARO's and his law firm's services in compromising their clients' interests in the arbitration and settling the arbitration on economic terms favorable to Defendant BETZOLD – terms that he would otherwise not receive if the arbitration damages hearing took place.

45. In furtherance of the Plan B strategy, Defendant BETZOLD, by and through his counsel in the Arbitration, Kirkland & Ellis, retained Defendants MISSNER, CHOSLOVSKY, and DLA as bankruptcy counsel.

46. Defendant MISSNER is a longtime friend of Kirkland & Ellis Partner Jack Levin, Defendant LEVIN's brother.

47. Upon information and belief, Defendants LEVIN and FUNKHOUSER were, at all relevant times, providing legal counsel and services to Defendant BETZOLD, either individually or through representation of The Betzold Companies, relative to the arbitration and/or bankruptcy matters.

*Appendix K*

**Defendants' Plan B fails – Former FBI Agent Marrocco Refuses To Sign An Affidavit and Refuses to Cooperate**

48. In connection with the component of their Plan B that focused on an effort to falsely embarrass Plaintiff FICARO and use the threat of such embarrassment to induce him and/or his law partners to sell out their clients by convincing their clients to settle the arbitration with Defendant BETZOLD on terms less favorable to Plaintiff FICARO's clients than they would have otherwise received after a damages hearing, Defendants proceeded to try to gather information concerning Plaintiff FICARO that they could use to attempt to extort.

49. Plaintiff FICARO and his law partners. Defendant LEVIN spoke with MARROCCO in or about the beginning of June 2004.

50. Defendant LEVIN informed MARROCCO that Defendant LEVIN was involved in a case being conducted by an alternative dispute resolution business called JAMS.

51. Defendant LEVIN informed MARROCCO that the case had been going well for him until Plaintiff FICARO appeared as counsel for his opponent.

52. Defendant LEVIN informed MARROCCO that he (Defendant LEVIN) wanted to "dirty up" Plaintiff FICARO and Judge Hett.

53. Defendant LEVIN informed MARROCCO that Judge Hett was acting as the judge on the case and that Judge Hett was a former Cook County Circuit Court Judge.

54. Defendant LEVIN informed MARROCCO that Defendant LEVIN believed Plaintiff FICARO must be dirty and that Defendant LEVIN felt Plaintiff FICARO could be forced out of the case.

55. During MARROCCO's first telephone conversation with Defendant LEVIN, referenced in the preceding paragraphs, Defendant LEVIN asked MARROCCO whether MARROCCO knew anything about Plaintiff FICARO that could reflect adversely on Plaintiff FICARO or Judge Hett.

56. MARROCCO informed Defendant LEVIN that MARROCCO did not know whether Plaintiff FICARO had close ties to Judge Hett.

57. Defendant LEVIN asked MARROCCO to provide him with information about Plaintiff FICARO. MARROCCO gave Defendant LEVIN a hand-signed short statement of certain information he remembered about Plaintiff FICARO.

58. The short statement from MARROCCO was *not* the MARROCCO affidavit later filed by Defendants in the Betzold Bankruptcy (discussed below), leaked to the media, and republished to persons not connected to any judicial proceedings. Its *content* was not the same at all as that of the forged MARROCCO affidavit.

59. Defendant LEVIN pressed MARROCCO to sign a detailed statement. MARROCCO declined to do so and informed Defendant LEVIN that he would not cooperate with Defendant LEVIN.

60. Prior to the publication of the article in the newspaper, Defendant LEVIN called MARROCCO again and read to him over the phone a statement that Defendant LEVIN said he had prepared and that he wanted MARROCCO to sign. MARROCCO indicated that he could not do so because Defendant LEVIN's proposed statement was not an accurate portrayal of MARROCCO's knowledge. Defendant LEVIN asked MARROCCO how the proposed statement sounded. MARROCCO informed Defendant LEVIN that he could not sign such a statement because it jumped to conclusions with which MARROCCO did not agree, was not within MARROCCO's knowledge, and that the proposed statement was not accurate.

61. MARROCCO declined to cooperate with Defendant LEVIN, in part, because MARROCCO received a phone call from COOLEY. During that call, COOLEY informed MARROCCO that if MARROCCO cooperated with Defendant LEVIN, MARROCCO could look forward to a big payday and that COOLEY was being paid for the information he gave to Defendant LEVIN.

62. MARROCCO refused to sign an affidavit, never did sign an affidavit, and never certified any statement in regard to Defendant LEVIN's inquiries or for the litigation in which Defendant LEVIN was involved.

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## DEFENDANTS PUBLISH DEFAMATORY MATERIAL ABOUT PLAINTIFF FICARO AND ATTEMPT TO EXTORT A SETTLEMENT FROM PLAINTIFF FICARO'S CLIENTS BY THREATENING TO RE-PUBLISH THE DEFAMATORY MATERIALS UNLESS FICARO'S CLIENTS SETTLED

63. As stated above, by early July, 2004, the arbitrator had ruled against Defendant BETZOLD and in favor of Plaintiff FICARO's clients, and damages hearings were being scheduled. After settlement attempts initiated by Defendant BETZOLD failed, Plaintiff FICARO's client was prepared to seek an award from the arbitrator of between twelve to fifteen million dollars in damages from Defendant BETZOLD.

64. Defendant BETZOLD continued to try to settle the matter on terms unfavorable to Plaintiff FICARO's clients and for millions of dollars less than Plaintiff FICARO's clients would be awarded by the arbitrator.

65. To prevent the arbitration hearing on damages from going forward, Defendant BETZOLD implemented another component of Defendants' Plan B strategy, and threatened to file a Chapter 11 bankruptcy petition to stay the arbitration.

66. To prevent the arbitration hearing on damages from going forward, Defendant BETZOLD implemented another component of Defendants' Plan B strategy, and threatened to disclose embarrassing information about Plaintiff FICARO.

67. On or about July 10, 2004, less than one month before filing a Chapter 11 bankruptcy for Defendant BETZOLD, Defendant MISSNER called Plaintiff FICARO's law partner, Gary Levenstein, to inform Levenstein about affidavits making allegations against Plaintiff FICARO.

68. In a voicemail left by Defendant MISSNER outside the regular course of judicial proceedings to a person – Levenstein – not connected with either the arbitration or the Betzold Bankruptcy (which had not yet been filed), Defendant MISSNER stated as follows:

> Gary, it's David Missner, 368-2170, Cell Phone is 847-804-0483. Home number is 773-327-7252 and I'm, I, got in my hands, some affidavits that have just about knocked me off my chair involving both the judge and Michael Ficaro and their connections with some bad people. These affidavits were obtained, I guess, in attempt to convince parties that, this, this arbitration was not anything but a fix, if you will and the people that we represent are obviously pretty desperate and are prepared to do just about anything to straighten this thing out, so, I can't show you these affidavits but I can assure you that I have them. The originals are in the hands of counsel at the Company and this is really unbelievable stuff, I've never really been associated with anything like this in my life so I, I don't exactly know how to proceed other than to say I, I

know that people have been talking settlement and I, I think that is a good thing, um, and I'm, I suppose this could be interpreted as leverage that, that they better settle or you know, or what kind of thing and I guess you could look at it that way but that's not really, I mean, you know, like this guy really wants to file bankruptcy, man, I don't think so but if he does then these affidavits would be filed and they would be public and it would be unbelievable and I don't think it would be good for um, the firm that Mr. Ficaro works for either. You know obviously once i's public, it's public so, it's big time publicity shit. Okay? So you got all my numbers, call me, we're not doing anything. I'm not going to do anything without hearing from you, talking to you and figuring out what is going on, fortunately it's the weekend. That's what I got to say. Bye.

69. The call to Levenstein and the voice-mail message Defendant MISSNER left published the fact of the allegations against Plaintiff FICARO and besmirched Plaintiff FICARO in the eyes of his law partner Levenstein as well as his other law partners.

70. At the time Defendant MISSNER published the defamatory allegations against Plaintiff FICARO in his out-of-court statement to Levenstein – someone not connected to the arbitration or the Betzold Bankruptcy, Defendant MISSNER did not honestly believe, nor could he reasonably have honestly believed, that the

defamatory statements could be relevant or material to any judicial or quasi-judicial proceedings.

71. The defamatory allegations were developed for the improper purpose of leveraging the reputation of the arbitration trial counsel – Plaintiff FICARO – against his own clients' interests.

72. In other words, the threat made was that if the case did not settle, bad statements would be published that would injure Plaintiff FICARO and his law firm.

73. One or more of the Defendants knew that Marrocco had not signed any affidavit and would not cooperate with Defendants.

74. Defendant MISSNER intended that publishing the defamatory allegations against Plaintiff FICARO to Levenstein – someone not connected to the arbitration or to the Betzold Bankruptcy – would result in Levenstein and other members of Levenstein's law firm exerting pressure on Plaintiff FICARO to persuade Plaintiff FICARO's client to settle on terms more favorable to Defendant BETZOLD under the threat of dissemination of the defamatory material.

75. Defendants MISSNER, CHOSLOVSKY and BETZOLD and others hoped that Plaintiff FICARO and co-counsel in the arbitration proceedings would exert pressure on their clients to settle on terms more favorable to Defendant BETZOLD under the threat of dissemination of the defamatory material.

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76. On information and belief, Defendants or several of them decided to execute their scheme, previously threatened and communicated to one of Plaintiff FICARO's law partners, to extort a favorable to Defendant Betzold settlement from Plaintiff FICARO's client.

77. On information and belief, one or more of the Defendants was aware that MARROCCO would not sign an affidavit and would not cooperate. These same Defendants also knew MARROCCO would not agree to or support the accusations necessary to carry out their efforts to extort a favorable settlement for Defendant BETZOLD by threatening to publish defamatory allegations about Plaintiff FICARO.

78. On information and belief, one or more Defendants determined to carry out their Plan B regardless of MARROCCO's involvement by placing his signature on the affidavit they prepared without his authorization or knowledge.

79. Prior to August 2, 2004, one or more of the Defendants, individually and through their duly authorized agents and employees, prepared the forged MARROCCO affidavit.

80. Prior to August 2, 2004, one or more of the Defendants, individually and through their duly authorized agents and employees, aided in the preparation of the forged MARROCCO affidavit.

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81. The purported MARROCCO affidavit is a forgery.

82. MARROCCO has seen the purported MARROCCO affidavit. He denies signing it, he denies approving the statements within that affidavit, and denies that he ever saw that affidavit before it was filed in bankruptcy court.

83. On information and belief, MARROCCO's signature was cut and pasted either by hand or electronically and placed on the purported affidavit by or at the direction of and knowledge of one or more of the Defendants.

84. The original of the purported MARROCCO affidavit was never filed and has never been produced.

85. On or before July 9, the date of the phone call and message to Plaintiff FICARO's partner publishing the defamatory material, one or more Defendants sent a copy of the forged MARROCCO affidavit to BETZOLD's Bankruptcy counsel, Defendants MISSNER, CHOSVLOVSKY and DLA.

86. On or about August 2, 2004, Defendants executed a component of their Plan B and initiated a bankruptcy proceeding (*In re Nicholas William Betzold, Jr.*) in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, bearing case number 04-B-28474 ("Betzold Bankruptcy").

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87. On or about August 2, 2004, when Plaintiff FICARO and his partners, under threat of extortion, refused to sell out their clients, one or more of the Defendants, individually and through their duly authorized agents and employees, filed the forged MARROCCO affidavit in the Betzold Bankruptcy.

88. On or about August 2, 2004, when Plaintiff FICARO and his partners, under threat of extortion, refused to sell out their clients, one or more of the Defendants, individually and through their duly authorized agents and employees, filed the COOLEY affidavit in the Betzold Bankruptcy.

89. On or about August 2, 2004, when Plaintiff FICARO and his partners, under threat of extortion, refused to sell out their clients, one or more of the Defendants, individually and through their duly authorized agents and employees, caused to be filed the COOLEY affidavit in the Betzold Bankruptcy.

90. On or about August 2, 2004, when Plaintiff FICARO and his partners, under threat of extortion, refused to sell out their clients, one or more of the Defendants, individually and through their duly authorized agents and employees, caused to be filed the forged MARROCCO affidavit in the Betzold Bankruptcy.

91. Defendant BETZOLD, through his attorneys Defendants MISSNER and CHOSLOVSKY, filed the COOLEY affidavit as an exhibit to a Motion to Enforce the Bankruptcy Stay.

92. The forged MARROCCO affidavit, however, was filed separately and not as an exhibit to any motion.

93. Neither affidavit was connected to or logically related to any proper issue before the bankruptcy court.

94. The filings all occurred within the City of Chicago, County of Cook, State of Illinois. Each of the Defendants has true and correct copies of the motion and affidavits referenced above. Because of the inflammatory and highly injurious content of the motion and affidavits, Plaintiff FICARO has filed both affidavits under seal as Exhibits A (COOLEY affidavit) and B (MARROCCO Affidavit) to this Amended Complaint.

95. The affidavits were and are irrelevant, immaterial, and scandalous. The content of the affidavits had no connection or logical relation to the bankruptcy litigation in which Defendants MISSNER and CHOSLOVSKY served as Counsel to Defendant BETZOLD. Plaintiff FICARO had no connection to the bankruptcy proceeding. Plaintiff FICARO did not file an appearance and did not represent the Respondents in bankruptcy before the bankruptcy court.

96. The affidavits contain defamatory accusations against Plaintiff FICARO. Specifically the following accusations in the COOLEY affidavit (Exhibit A hereto) are defamatory: ¶¶ 2, 3, 8, and 12.

97. Even if the MARROCCO affidavit had not been forged, the following accusations in that affidavit (Exhibit B hereto) are defamatory: ¶¶ 4, 6, and 7.

**THE FILING OF THE MARROCCO AFFIDAVIT WAS A NULLITY BECAUSE THE AFFIDAVIT WAS A FORGERY**

98. MARROCCO, the alleged affiant, has seen the purported affidavit. He denies preparing it, signing it, affirming the content of the affidavit, or seeing the transcript of which a portion is contained in the forged affidavit.

99. MARROCCO refused to sign an affidavit, never did sign an affidavit, nor did he certify any statement in regard to Defendant LEVIN's inquiries or for the litigation in which Defendant LEVIN was involved.

100. As alleged above, one or more of the Defendants forged the content of the purported MARROCCO affidavit, forged MARROCCO's signature and filed an affidavit, purportedly from MARROCCO, in connection with the Betzold Bankruptcy.

101. MARROCCO states that he did not know that an affidavit, purportedly from him, was going to be filed, and never authorized anyone to sign his name to such an affidavit.

102. Under Illinois law, a forged affidavit is a nullity. *Hough v. Weber*, 202 Ill.App.3d 674, 692 (1990); *Roth v. Ill. Farmers*, 202 Ill.2d 490 (2002).

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## THE MARROCCO AFFIDAVIT WAS NOT CONNECTED TO OR LOGICALLY RELATED TO THE BETZOLD BANKRUPTCY

103. The forged MARROCCO affidavit was not connected to or logically related to the Betzold Bankruptcy.

104. Moreover, the forged MARROCCO affidavit was filed separately by Defendants on August 2, 2004. It was not attached to any pleading.

105. Moreover, the forged MARROCCO affidavit did not have the caption of the proceedings taking place before the bankruptcy court. *See* Exhibit B to this Amended Complaint (Exhibit Filed under seal).

106. The forged MARROCCO affidavit was not prepared in the form necessary for compliance with Federal Rules of Bankruptcy Procedure.

## THE PUBLICATION OF THE MARROCCO AFFIDAVIT VIOLATED 18 U.S.C. §2517

107. The publication of the MARROCCO affidavit violated 18 U.S.C. §2517.

108. MARROCCO would have been barred from presenting any testimony concerning evidence obtained by wiretapping. *Katz v. U.S.*, 88 S. Ct. 507 (1967). None of the permitted exceptions to 18 U.S.C. §2517 applied here. *See In Re Application of National Broadcasting*

*Co. v. U.S. Dept. of Justice*, 735 F.2d 51 (2nd Cir. 1984) (holding that 18 U.S.C. §2517 was not intended to permit private parties to use overhears in civil cases).

109. Defendants knew or reasonably should have known that even if the content of the MARROCCO affidavit was actually provided by MARROCCO and did not constitute false, forged contents, the publication of the MARROCCO affidavit by Defendants constituted a violation of 18 U.S.C. §2517.

**DEFENDANTS FURTHER THEIR FRAUDULENT EXTORTION SCHEME BY PERPETRATING FRAUD ON THE BANKRUPTCY COURT AND THE OTHER PARTIES**

110. On information and belief, one or more of the Defendants prepared the false and defamatory content of the forged affidavit and placed MARROCCO's signature on the document without MARROCCO's knowledge or authorization in the furtherance of this fraudulent scheme.

111. On or about August 2, 2004, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, with reckless disregard for the truth, maliciously and wrongfully procured, approved authorized, composed, provided, wrote, printed and filed, or caused the composition, writing, providing, printing and filing of the aforementioned Motion to Stay and purported certified affidavits signed by MARROCCO and COOLEY.

112. Only the COOLEY affidavit was attached to the aforesaid Motion to Enforce Automatic Stay.

113. The forged MARROCCO affidavit was filed separately and did not have the caption of the proceedings taking place before the bankruptcy court. The affidavits contained, stated, represented, imputed and implied false and defamatory matter concerning Plaintiff FICARO, falsely alleging that Plaintiff had an improper and/or criminal affiliation with reputed criminals, falsely alleging that Plaintiff had engaged in criminal acts, and falsely alleging that Plaintiff had engaged in professional wrongdoing. *See* Exhibit B to this Amended Complaint (Exhibit Filed under seal), ¶¶ XXXXX.

114. On information and belief, Defendants BETZOLD, MISSNER, CHOSLOVSKY and LEVIN perpetrated a continued fraud on the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, by later representing in Court that they anticipated that MARROCCO would testify at an evidentiary hearing in the case, even though Defendants BETZOLD, MISSNER AND CHOSLOVSKY knew or should have known, by virtue of the forged affidavit and MARROCCO's refusal to cooperate with their fraudulent scheme, that MARROCCO had already refused to cooperate and would continue to refuse to cooperate with their fraudulent scheme.

115. On information and belief, the intent in forging the alleged MARROCCO affidavit and in filing it was to perpetrate a fraud on the court and the parties as part of the previously threatened extortion scheme, so as to avoid completion of the arbitration process that would have resulted in an award of twelve to fifteen million dollars in damages against Defendant BETZOLD and in favor of Plaintiff FICARO's clients.

116. The forged MARROCCO affidavit filed by Defendant BETZOLD, through his attorneys Defendants MISSNER and CHOSLOVSKY, was not connected to or logically related to any proper issue before the bankruptcy court. It constituted nothing more than an extortion attempt to obtain leverage to force Plaintiff FICARO to convince his clients that they should settle their arbitration dispute with Defendant BETZOLD on terms less favorable than those they would expect to receive following a hearing on damages.

**DEFENDANTS ATTEMPT TO BRIBE MARROCCO AND ATTEMPT TO INCLUDE MARROCCO IN DEFENDANTS' EXTORTION SCHEME**

117. Prior to the publication of the articles in the newspapers and the republication of the defamatory statements alleged above, Defendant LEVIN called MARROCCO again and read to MARROCCO over the phone a statement that Defendant LEVIN said Defendant LEVIN had prepared and that he wanted MARROCCO to sign. MARROCCO indicated that he could not do so because Defendant LEVIN's proposed

statement was not accurate, was not a portrayal of MARROCCO's knowledge of Plaintiff FICARO and because it jumped to conclusions about Plaintiff FICARO with which MARROCCO did not agree.

118. During the call referenced in the preceding paragraph, Defendant LEVIN informed MARROCCO that if MARROCCO would agree to "cooperate," MARROCCO would be taken care of when the case was over.

119. MARROCCO understood Defendant LEVIN to be saying that MARROCCO would be paid for his cooperation but that Defendant LEVIN did not want to pay MARROCCO as a consultant or expert witness while the case was pending because it would look bad. During this phone call, MARROCCO again refused to participate in the fraudulent scheme perpetrated by Defendants and promptly after the phone call, retained counsel who informed Defendant LEVIN that MARROCCO would not be cooperating in the Betzold matter.

**DEFENDANTS FURTHER THEIR EXTORTION SCHEME BY LEAKING THE AFFIDAVITS TO THE PRESS**

120. Defendants MISSNER and CHOSLOVSKY filed the affidavits, including the forged MARROCCO affidavit, on Defendant BETZOLD's behalf on August 2, 2004 late in the afternoon.

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121. On information and belief, at the time of the filing of the affidavits, the only persons known to have copies of the affidavits, including the forged MARROCCO affidavit, were counsel for Defendant BETZOLD – Defendants MISSNER, CHOSLOVSKY, LEVIN, and LIEBMAN.

122. As noted above, Defendant MISSNER had made an out-of-court, extra-judicial threat to Levenstein – a person not connected with any judicial proceedings – that if the arbitration in which Plaintiff FICARO was a counsel to one of the parties did not settle, the defamatory allegations, including those in the forged MARROCCO affidavit, would be made public. Defendants MISSNER's statement was not made in furtherance of the arbitration or the Betzold Bankruptcy.

123. On information and belief, on or about August 2, 2004 and continuing thereafter, including on or about August 3 and 4, 2004, one or more of the Defendants leaked the allegations or the fact of the affidavits and that they were filed in the Betzold Bankruptcy, to the press, including to the Chicago Sun-Times.

124. Specifically, on or about August 2, 2004 and continuing thereafter, including on or about August 5 and 6, 2004, Defendants then and there maliciously and wrongfully caused the further republication of the false and defamatory matter, set forth in the aforementioned Motion to Stay and the purported affidavits of MARROCCO and COOLEY in the Chicago Sun-Times

and the Daily Herald, newspapers of general circulation in and throughout the Chicago metropolitan area, including Cook County, Illinois.

125. Each of the Defendants has true and correct copies of the articles referenced above. Because of the inflammatory and highly injurious content of the articles, Plaintiff FICARO intends to seek leave to file the articles under seal as group Exhibit C to this pleading.

126. On or about August 2, 2004 and continuing thereafter, Defendants, then and there maliciously and wrongfully orally communicated the false and defamatory matter, set forth in the Motion to Stay and the purported certified affidavits of MARROCCO and COOLEY in an effort to further defame Plaintiff FICARO, including to his clients, colleagues, partners and the public at-large.

127. On or about August 5, 2004, MARROCCO was surprised to read an article in the Chicago Sun-Times that indicated he had provided and signed an affidavit.

**THE AFFIDAVITS WERE A NULLITY BECAUSE THEY HAD NO CONNECTION OR LOGICAL RELATION TO THE BETZOLD BANKRUPTCY**

128. Even if the affidavits contained otherwise admissible testimony, neither affidavit had a connection or logical relation to the arbitration or to the Betzold Bankruptcy.

129. Additionally, neither affidavit was made to achieve the objects of the arbitration or the Betzold Bankruptcy.

130. Moreover, Defendants' conduct, as more fully described in this Amended Complaint, is separate and distinct from conduct typically found within even the most litigious court proceedings.

131. The COOLEY affidavit personally attacked Plaintiff FICARO regarding events that occurred more than 15 years, and separately personally attacked Judge Hett regarding events that occurred more than 15 years ago.

132. The personal attacks on Plaintiff FICARO and Judge Hett were not related in any way other than by inclusion in the same affidavit.

133. Moreover, the personal attacks had nothing to do with the allegations of Defendant BETZOLD's Chapter 11 petition, Defendant BETZOLD's Adversary Complaint, or Defendant BETZOLD's accusations of impropriety made in an effort to enforce the bankruptcy stay.

134. The forged MARROCCO affidavit, apart from being forged, was improperly filed and related events that purportedly occurred more than 15 years ago. Judge Hett is not mentioned in the MARROCCO Affidavit.

135. The MARROCCO affidavit had nothing to do with the allegations of Defendant BETZOLD's Chapter 11 petition, Defendant BETZOLD's Adversary Complaint, or Defendant BETZOLD's accusations of impropriety made in an effort to enforce the bankruptcy stay.

136. The only apparent reason for Defendants BETZOLD, MISSNER and CHOSLOVSKY to file the forged MARROCCO affidavit was to execute on their extortion threat by impugning Plaintiff FICARO's reputation and to create publicity that would force an unfavorable settlement on behalf of Plaintiff FICARO's client of the underlying arbitration and in favor of Defendant BETZOLD.

137. The sole expressed basis for filing the affidavits demonstrates that the affidavits do not relate to any issue concerning the Motion to Enforce Stay. Defendant BETZOLD, through his attorneys Defendants MISSNER and CHOSLOVSKY, asserted that, read together, the affidavits "make clear that the Arbitrator and Mr. Ficaro have a common association." (Motion To Enforce Stay at ¶41). In fact, the affidavits, including the forged MARROCCO affidavit, at most even if true, showed nothing more than the fact that two lawyers were at an unidentified, unknown social or fundraising event more than a decade ago. The forged MARROCCO affidavit did not even mention Judge Hett.

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138. A "common association" had no legal connection or logical relation to the issue of whether the bankruptcy court should lift the stay and allow the arbitration, in which a liability finding had already been entered, should continue through damages hearing and verdict.

139. Defendant BETZOLD, through his attorneys Defendants MISSNER and CHOSLOVSKY, did not and could not explain how this purported "common association" related to the Motion To Enforce Stay. The expressed purpose was in fact completely unrelated to the issues involved in the Betzold Bankruptcy. To the contrary, Defendant BETZOLD, through his attorneys' Defendants MISSNER and CHOSLOVSKY now have admitted that the only claim made that related to the arbitration overlaps claims on which liability was already found against Defendant BETZOLD in the arbitration.

140. In an effort to justify the defamation, Defendant BETZOLD, through his attorneys' Defendants MISSNER and CHOSLOVSKY, cited to the bankruptcy court several cases for the "fraud exception" to *res judicata* (Motion to Enforce Stay n. 8). But Defendant BETZOLD did not allege fraud in the arbitration. More importantly, Defendant BETZOLD offered no explanation – and there is none – as to how the purported "common association" relates to the claim in the Adversary Complaint.

141. A "common association" did not and does not support any permissible ground for reversal of an

arbitration award, even if Defendant BETZOLD's request was timely filed. Nor did it advance any argument that Defendant BETZOLD met the elements necessary to justify enforcing the stay as it related to the arbitration proceedings.

**THE AFFIDAVITS WERE A NULLITY BECAUSE THEY HAD NO CONNECTION OR LOGICAL RELATION TO ANY EFFORTS TO CHALLENGE THE ARBITRATION DECISION ON LIABILITY**

142. The standard for vacation of an arbitration award, as related to Defendant BETZOLD's motion, is well-established. Defendant BETZOLD argued that the Illinois Arbitration Act, 710ILCS 5/1 *et seq.*, and not the Federal Arbitration Act ("FAA"), applied. (Motion To Enforce Stay n. 9).

143. Illinois law provides that in order to vacate an arbitration award based on partiality of the arbitrator, "it is necessary to show a 'direct definitive and demonstrable' interest, on the part of the arbitrator, in the outcome of the arbitration." *Freeport Const. Co. v. Star Forge, Inc.*, 378 N.E.2d 558 (Ill. Ct. App. 1978). Such proof of partiality of the arbitrator "must be direct, definitive, and capable of demonstration rather than remote, uncertain, or speculative." *William B. Lucke, Inc. v. Spiegel*, 266 N.E.2d 504 (Ill. Ct. App. 1970).

144. Even if Defendants had not forged the MARROCCO affidavit and it was an authentic affidavit, neither of the affidavits offers direct, definitive proof.

Instead, the affidavits contain remote, uncertain or speculative hearsay statements and lack any evidentiary foundation to show partiality (as discussed more fully below).

145. The standard for vacating an arbitration award under the FAA is identical to that under Illinois law. To set aside an award for arbitration partiality, "the interest or bias . . . must be direct, definite and capable of demonstration rather than remote, uncertain or speculative." *Tamari v. Bache Halsey Stuart, Inc.*, 619 F.2 1196, 1200 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980) (affirming district court's dismissal of complaint challenging an arbitration award) (quoting *United States Wrestling Federation v. Wrestling Division of the AAU, Inc.*, 605 F.2d 313, 318 (7th Cir. 1979).

146. "[T]he burden on a claimant for vacation of an arbitration award due to 'evident partiality' is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator." *Peoples Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993) (emphasis added) (affirming confirmation of arbitration award and rejecting claim that arbitrator was not partial). Again, neither of the affidavits offers direct, definitive proof of conduct in temporal proximity to the arbitration hearing. Moreover, the forged MARROCCO affidavit does not even mention Judge Hett.

147. Even if the claim of a "common association" suggested an appearance of bias – and it does not – it

is well-established that the mere appearance of bias is legally insufficient to demonstrate evident partiality. *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992).

148. Defendants BETZOLD, MISSNER and CHOSLOVSKY knew or should have known of the fact that the defamatory allegations had no connection to or logical relation to the Betzold Bankruptcy.

**THE AFFIDAVITS WERE A NULLITY BECAUSE IN ADDITION TO ONE OF THEM BEING FORGED, NEITHER AFFIDAVIT MET THE LEGAL REQUIREMENTS FOR AFFIDAVITS**

149. The affidavits were also a nullity, even if the MARROCCO affidavit had not been forged, because neither affidavit met the legal requirements for affidavits expressly stated in 28 U.S.C. §1746.

150. The affidavits were not notarized. Instead, the affidavits included a statement under Section 1-109 of the Illinois Code of Civil Procedure. Neither statement contains the mandatory language expressly required by 28 U.S.C. §1746(2). Moreover, both affidavits expressly emphasize in the statement that the affidavits contain statements made on information and belief. This is not permitted under 28 U.S.C. §1746.

151. The requirements for a valid affidavit (typically filed in connection with a motion for summary judgment) are found in Fed. R. Civ. P. 56(e), made applicable to

bankruptcy litigation under Fed. R. Bankr. P. 7056. Rule 7056 has four requirements: (1) the affidavit must be made on the personal knowledge of the affiant; (2) the affidavit must set forth facts which would be admissible at trial; (3) the affidavit must show affirmatively that the affiant is competent to testify to the matters therein; and (4) if the affiant refers to written documents within the affidavit, sworn or certified copies of the documents must be attached to the affidavit or served therewith. Fed. R. Bankr. P. 7056.

152. Conclusory statements of law or fact are not permissible under Fed. R. Bankr. P. 7056. *Banner Oil Co. v. Bryson (In Re Bryson)*, 187 B.R. 939, 950 (Bankr. N.D. Ill. 1995).

153. The policy underlying Rule 7056(e) is to permit in an affidavit only evidence that could be admitted through witness testimony at trial. *Pfeil v. Rogers*, 757 F.2d 850, 860 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986) (quoting 6 Moore's Federal Practice, §56.22 [1] at 1321-22 (1982)).

154. Paragraphs 4, 5, 8, 12, 13, 14, 15, 16 of the Cooley Affidavit (Exhibit A hereto) were inadmissible because they were beyond the first-hand knowledge of the affiant and constituted inadmissible hearsay. *See* Fed. R. Ev. 602, 608. The statements remaining after exclusion of inadmissible hearsay were that: (a) Cooley knew Mr. Ficaro and Judge Hett, and (b) that Cooley saw Mr. Ficaro and Judge Hett at political fund raising functions.

155. Notably, Defendant BETZOLD did not explain how any of this related to Defendant BETZOLD's Chapter 11 petition, Defendant BETZOLD's Adversary Complaint, or Defendant BETZOLD's accusations of impropriety made in an effort to enforce the stay.

156. Moreover, even the statements remaining in the Cooley Affidavit (¶¶ 1, 2, 3, 4, 5, 10) after exclusion of the inadmissible hearsay, were themselves inadmissible because they were vague, conclusory and lacked an admissible evidentiary foundation.

157. As noted above, the MARROCCO affidavit was a forgery and part of the fraudulent scheme perpetrated by the Defendants. Even if that affidavit was authentic, ¶¶ 4, 5, 6 and 7 of the MARROCCO Affidavit (Exhibit B hereto) were inadmissible because they were beyond the first-hand knowledge of the "affiant" and constituted inadmissible hearsay. *See* Fed. R. Ev. 602, 608.

158. As noted above, nothing in the MARROCCO affidavit, including the inadmissible hearsay statements, was connected to or logically related to any issue in the Betzold Bankruptcy. It follows then that the statements remaining, after exclusion of the inadmissible hearsay, also did not relate to any issue in the Betzold Bankruptcy.

159. The statements remaining in the forged MARROCCO affidavit (¶¶ 1, 2, 3) after exclusion of the inadmissible hearsay, were themselves inadmissible because they were vague, conclusory and lacked an

admissible evidentiary foundation. Additionally, ¶¶ 4 and 7 of the forged MARROCCO affidavit were vague, conclusory and lacked an admissible evidentiary foundation.

**THE COLLATERAL CHALLENGE IN THE BETZOLD BANKRUPTCY TO THE ARBITRATION DID NOT INVOLVE LITIGANTS OR OTHER PARTICIPANTS AUTHORIZED BY LAW, BECAUSE DEFENDANT BETZOLD HAD WAIVED A RIGHT TO CHALLENGE THE ARBITRATION AWARD**

160. The Betzold Bankruptcy did not involve litigants or other participants authorized by law. Defendant Betzold had previously waived a right to challenge the arbitration award – his sole objective in filing bankruptcy.

161. Parties to an agreement to arbitrate may specifically bargain for and specify terms they intend will govern the resolution of their dispute by arbitration. *Mastrobuono v. Shearson, Lehman, Hutton, Inc.*, 514 U.S. 52, 57 (1995).

162. The affidavits, if admissible, and if the MARROCCO affidavit was not forged, were arguably relevant only if Defendant BETZOLD was permitted to collaterally challenge in federal court the arbitration ruling on liability. The affidavits were not material to such a challenge however, because Defendant BETZOLD already had contracted away his right to raise such a challenge.

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163. The July 21, 1999 Stock Purchase and Option Agreement ("Agreement") between Plaintiff FICARO's clients in the arbitration and Defendant BETZOLD contained an arbitration clause requiring that any disputes be arbitrated in accordance "with the Commercial Arbitration Rules of JAMS/Endispute." The same Agreement provides that "[t]he arbitrator's decision shall be final and nonappealable."

164. The arbitration was, in fact, conducted pursuant to the Commercial Arbitration Rules of JAMS/Endispute ("JAMS Rules").

165. The JAMS Rules expressly permitted Defendant Betzold, during the arbitration, to "challenge the continued service of an arbitrator for cause." (Rule 15(i) of JAMS Rules). Defendant BETZOLD admitted that he did so. (Motion To Enforce Stay ¶42).

166. As provided by Rule 15(i) of JAMS rules, an independent panel at JAMS, after briefing and argument by the parties, held that: (a) an adequate disclosure was made by Judge Hett; (b) any history between Judge Hett and Plaintiff FICARO was too tenuous to require Judge Hett's recusal; and (c) the adverse ruling [against Defendant BETZOLD] was not a basis upon which to seek removal of an arbitrator. A copy of the JAMS decision in response to Defendant BETZOLD's challenge of the continued service of the arbitrator is attached hereto as Exhibit D.

167. Importantly, Rule 15(i) of JAMS Rules – a contractual provision to which Defendant BETZOLD expressly agreed by agreeing to have JAMS arbitrate any disputes between the parties – expressly states that the determination by JAMS "is final." As a result, Defendant BETZOLD's effort to challenge the arbitration in bankruptcy court had no legal basis and only could have been a subterfuge to create a forum for the defamation against Plaintiff FICARO.

**THE AFFIDAVITS WERE ALSO A NULLITY BECAUSE THE BANKRUPTCY COURT LACKED JURISDICTION TO CONSIDER THE ALLEGATIONS IN THEM**

168. The affidavits were also a nullity because the bankruptcy court lacked jurisdiction to consider the allegations contained in the affidavits.

169. At the initial hearing in the bankruptcy court on or about August 2, 2004, before the Honorable Susan Pierce Sonderby, the Court warned Defendant MISSNER that it did not have jurisdiction under the federal "*Rooker-Feldman*" doctrine to re-examine state court determinations. Defendants BETZOLD, MISSNER and CHOSLOVSKY were thereby put on notice that their defamatory statements were not connected to and had no logical relationship to the issues before the federal court.

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170. Under the facts, the federal court lacked jurisdiction pursuant to the federal *Rooker-Feldman* doctrine to rule on the matters at issue in the pending arbitration proceeding. The matter was subsequently sent back to arbitration. Judge John Schwartz lifted the bankruptcy stay, citing the *Rooker-Feldman* doctrine. He did not address the substance of the defamatory allegations in the affidavits.

171. The *Rooker-Feldman* doctrine stands for the principle that the lower federal courts, including bankruptcy courts, lack subject matter jurisdiction to hear challenges to decisions made by state courts in judicial proceedings. *In re Benalcazar*, 283 B.R. 514 (Bkrtcy. N.D. Ill. 2002).

172. The majority of federal Circuit Courts of Appeal hold that the *Rooker-Feldman* doctrine applies to state court interlocutory orders as well as final orders. *Pieper v. American Arbitration Association*, 336 F.3d 458, 462-463 (6th Cir. 2003).

173. The *Rooker-Feldman* doctrine applies not only to actual state court decisions but also to matters that are "inextricably intertwined" with the merits of the state court judgment. *Benalcazar*, 283 B.R. 514, citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983) and *Remer v. Burlington Area School District*, 205 F.3d 990, 996 (7th Cir. 2000) (noting that "it can be difficult to discern which claims are and which claims are not 'inextricably

intertwined' with a state judgment," but that "the crucial point is whether 'the district court is in essence being called upon to review the state-court decision'").

174. A state court's decision as to the arbitrability of a dispute is subject to the *Rooker-Feldman* doctrine when a party seeks to attack that ruling in a subsequent federal court proceeding. *Friedman's Inc. v. Dunlap*, 290 F.3d 191, 196-197 (4th Cir. 2002).

175. Thus, where a debtor objected to a claim in bankruptcy that was based on an arbitration award on the basis that the arbitrators were biased and the arbitration process was "tainted," the federal court lacked jurisdiction to hear that objection because the *Rooker-Feldman* doctrine barred the Bankruptcy Court from re-visiting the state court order referring the dispute to arbitration. "Any portion of the Debtor's attack on the arbitration award that flows from the Debtor's contention that the initial arbitration process is flawed is therefore unfounded." *Robinson v. Champaign Landmark, Inc. (In re Robinson)*, 265 B.R. 722, 728 (6th Cir. BAP 2001).

176. Other federal courts have also ruled that a state court's ruling on arbitrability is "inextricably intertwined" with the rulings made by the arbitrators and therefore barred by the doctrine. *See, e.g., Tyco Healthcare v. Kimberly-Clark Corp.*, 2003 WL 23204653 (W.D. Wis. 2003) (where state court had ordered arbitration on same issues later included in plaintiff's complaint, *Rooker-Feldman* bars litigation of such issues

in federal court); *Mayes v. Wheaton*, 1999 WL 1000510 (N.D. Ill. 1999) (claims against arbitrators inextricably intertwined with related state court rulings and barred by *Rooker-Feldman*); *Mailly v. Wachovia*, 2004 WL 601654 (M.D.N.C. 2004) (state court ruling on arbitrability of claims barred by *Rooker-Feldman* in subsequent federal action raising same claims).

177. Any review by the federal court of the issues involved in the Betzold arbitration proceeding (including the matters alleged by the Debtor in its adversary proceeding) was inextricably intertwined with and would have necessarily infringed on the Illinois state court's order directing arbitration of the parties' disputes, as well as the affirmation of that order on appeal. The arbitration process had not yet concluded.

178. The *Rooker-Feldman* doctrine would serve little purpose in the context of arbitration orders if, upon entry of an order compelling arbitration of a dispute, a party could simply file a federal lawsuit attacking the process or do so in the context of a bankruptcy petition, to take advantage of the automatic stay. Any such arguments should be made and ruled upon in the context of the state court proceeding to compel arbitration. This is exactly the type of jurisdictional infringement the doctrine addresses.

179. It was clear that any federal remedies did not come into existence until after the arbitration proceeding had concluded and the award and/or related order had been confirmed.

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180. Defendants BETZOLD, MISSNER and CHOSLOVSKY knew or should have known, prior to the submission of the defamatory affidavits, including the forged MARROCCO affidavit, that the *Rooker-Feldman* doctrine barred an interlocutory review of the arbitration and also knew or should have known that the defamatory allegations had nothing to do with any issue before the bankruptcy court.

181. On hearing of the Motion to Enforce the Stay and respondents' Cross-Motion to Vacate the Stay, the United States Bankruptcy Court, Honorable John Schwartz presiding, denied Betzold's Motion on the grounds that the Court, under the *Rooker-Feldman* doctrine, did not have jurisdiction to consider the claims.

**DEFENDANTS CONTINUED TO PERPETRATE THEIR FRAUDULENT EXTORTION SCHEME BY PRETENDING THAT THE AFFIDAVITS WERE AUTHENTIC AND THAT THEY SUPPORTED DEFENDANTS' ACCUSATIONS**

182. After the affidavits were filed in the Betzold Bankruptcy, a motion was filed to strike the affidavits ("Motion").

183. In response to the Motion, and as part of their fraudulent scheme, Defendants BETZOLD, MISSNER and CHOSLOVSKY avoided responding directly to the merits of the Motion, and argued instead that the inadmissibility of the unsworn affidavits could be overcome by other unspecified evidence Defendant

BETZOLD wanted to offer at an evidentiary hearing. Defendants used the threat of a hearing to further advance their extortion attempts, hoping that the adverse publicity of the defamatory statements would force Plaintiff FICARO's client to settle on unfavorable terms.

184. Defendants intended that the threat of a further evidentiary hearing, where additional inflammatory and false information might be disclosed about Plaintiff FICARO, would force Plaintiff FICARO to persuade his clients to settle their arbitration dispute on terms less favorable than they otherwise would have and more favorable to Defendant BETZOLD.

185. Defendant BETZOLD, by and through his counsel Defendants MISSNER and CHOSLOVSKY, asserted that the affidavits constitute "evidence" that "reinforces the notion that some highly unusual connections exist between Mr. Ficaro and the arbitrator, and that further discovery and an evidentiary hearing are necessary."

186. Nothing in the affidavits reinforces such a notion, and Defendant BETZOLD, by and through his counsel Defendants MISSNER and CHOSLOVSKY, knew this.

187. Significantly, Defendant BETZOLD, by and through his counsel Defendants MISSNER and CHOSLOVSKY, did not dispute that the affidavits do not contain any relevant or material evidence. To the

contrary, Defendant BETZOLD, by and through his counsel Defendants MISSNER and CHOSLOVSKY, suggested that Defendant BETZOLD would present *other unspecified* evidence at an evidentiary hearing.

188. Even if the MARROCCO affidavit was not a forgery, the irrelevant, immaterial, inadmissible "evidence" in the affidavits did not support *any* claim, much less a claim that merited an evidentiary hearing on irrelevant, immaterial, and inadmissible issues.

189. Defendant BETZOLD, by and through his counsel Defendants MISSNER and CHOSLOVSKY, suggested that the affidavits are "clearly relevant to the credibility of statements made by Mr. Ficaro to JAMS, which Mr. Ficaro himself put at issue".

190. The case, however, was in federal court. Plaintiff FICARO was not counsel to any party in the federal proceeding. The defamatory allegations therefore were far removed from anything relevant or material to the bankruptcy proceeding and had no connection or logical relation to such proceedings.

191. Plaintiff FICARO's credibility did not have anything to do with the Bankruptcy proceeding. The scandalous, inadmissible statements in the affidavits had nothing to do with the bankruptcy proceeding.

192. Moreover, one or more of the Defendants knew at the time these statements were being made that MARROCCO would not cooperate and would not testify

at an evidentiary hearing. And any Defendant that did not know this had no good faith basis for expressly representing that MARROCCO would testify at such a hearing.

**DEFENDANTS WITHDREW THE AFFIDAVITS AFTER THEY HAD ALREADY SUCCEEDED IN DEFAMING PLAINTIFF FICARO AND INITIATING THEIR FRAUDULENT SCHEME TO EXTORT A QUICK UNFAVORABLE SETTLEMENT OF THE UNDERLYING ARBITRATION**

193. After a motion to strike the affidavits was filed in bankruptcy court but before that court could rule on that Motion, Defendant MISSNER withdrew the affidavits.

194. The withdrawal of the affidavits establishes that the affidavits, even if the MARROCCO affidavit was not a forgery, never had a legitimate purpose in the litigation and were a nullity.

**DEFENDANTS CONTINUED THEIR SCHEME AND COVER UP BY ATTEMPTING TO NEGOTIATE A RELEASE FOR THEIR WRONGFUL CONDUCT FROM PLAINTIFF FICARO AS WELL AS THE MINORITY SHAREHOLDERS**

195. After the bankruptcy court lifted the stay and remanded the matter back to arbitration for completion of the damages hearing, the parties to the arbitration

renewed efforts to settle. An agreement in principle was reached shortly before the damages hearing was to proceed.

196. Defendants BETZOLD, LEVIN and others demanded releases from Plaintiff FICARO for their defamation and as an effort to forever conceal the forgery and other wrongful conduct set forth above. Plaintiff FICARO refused to provide such releases.

197. The demand for releases by Plaintiff FICARO - the minority shareholders' arbitration counsel - was further effort to leverage the attorney against his clients and, in addition, indicates these Defendants knew their conduct was wrongful and actionable.

198. As they feared, Defendant BETZOLD lost his controlling shares of The Betzold Companies and had to sell his entire interest to resolve the matter, Defendant LEVIN lost his job with The Betzold Companies, and Defendant FUNKHOUSER and Respondent-in-Discovery LIEBMAN were fired as counsel by the new ownership of the Companies. None of these outcomes made Plaintiff FICARO whole, however.

*Appendix K*

## COUNT I
## ABUSE OF PROCESS
## (Against All Defendants)

199. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

200. As shown above, Defendants had an ulterior purpose and motive in filing the Betzold Bankruptcy. That ulterior purpose and motive as, was further detailed herein, to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client in that arbitration by threatening to publish defamatory statements about Plaintiff FICARO.

201. Defendants BETZOLD, MISSNER and CHOSLOVSKY, as further detailed above, used the legal process in the Betzold Bankruptcy to perpetrate their fraudulent extortion scheme by filing in that case defamatory affidavits (including one that was forged by Defendants) that had nothing to do with that case and that were a nullity.

202. As explained in detail above, the filing of the affidavits was not proper in the regular prosecution of the Betzold Bankruptcy.

203. The Betzold Bankruptcy was used by Defendants BETZOLD, MISSNER and CHOSLOVSKY to perpetrate an extortion scheme to

accomplish an objective (forcing a settlement on terms unfavorable to Plaintiff FICARO's client) which could not be accomplished through the bankruptcy case itself.

204. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00). Plaintiff FICARO also seeks recovery of special damages, punitive damages and attorneys' fees, all to be established at trial.

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## COUNT II
## INTENTIONAL DEFAMATION
## (Against All Defendants)

205. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

206. The contents statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, including the forged MARROCCO affidavit, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, were and are false and constituted libel, slander and defamation *per se*.

207. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be defamed, and maligned and damaged Plaintiff's professional and personal reputation.

208. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from intentionally and recklessly declaring false information about Plaintiff FICARO.

209. The aforesaid intentional and malicious acts of Defendants BETZOLD, LEVIN, FUNKHOUSER,

MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

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## COUNT III
## NEGLIGENT DEFAMATION
## (Against All Defendants)

210. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

211. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

212. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles concerning Plaintiff FICARO, caused Plaintiff to be defamed, and maligned and damaged Plaintiff's professional and personal reputation.

213. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from negligently declaring false information about Plaintiff FICARO.

214. The aforesaid negligent acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER,

CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

*Appendix K*

## COUNT IV
## INTENTIONAL FALSE LIGHT INVASION OF PRIVACY
## (Against All Defendants)

215. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

216. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

217. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be placed in a false light before the public, were highly offensive to a reasonable person, and maligned and damaged Plaintiff's professional and personal reputation.

218. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from intentionally and recklessly declaring false information about Plaintiff FICARO, so as to place Plaintiff in a false light.

219. The aforesaid intentional and malicious acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER, RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

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**COUNT V**
**NEGLIGENT FALSE LIGHT**
**INVASION OF PRIVACY**
**(Against All Defendants)**

220. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

221. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

222. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be placed in a false light before the public, were highly offensive to a reasonable person, and maligned and damaged Plaintiff's professional and personal reputation.

223. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from negligently declaring false information about Plaintiff FICARO, so as to place Plaintiff in a false light.

224. The aforesaid negligent acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

*Appendix K*

## COUNT VI
## MALICIOUS PROSECUTION
## (Against All Defendants)

225. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

226. Defendants BETZOLD, MISSNER and CHOSLOVSKY instituted and prosecuted judicial proceedings in the Betzold Bankruptcy.

227. For the reasons discussed in detail above, there was no probable cause for instituting and prosecuting those proceedings, and no probable cause for instituting and prosecuting the defamatory charges against Plaintiff FICARO in those proceedings.

228. In instituting and prosecuting the judicial proceedings in the Betzold Bankruptcy, including the defamatory charges against Plaintiff FICARO, Defendants intended to follow through on their fraudulent scheme and threats to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client by defaming Plaintiff FICARO.

229. At all relevant times in connection with their acts against Plaintiff FICARO, Defendants acted with malice.

230. Defendants withdrew the affidavits, including the forged MARROCCO affidavit, from the bankruptcy proceeding. Additionally, the bankruptcy court determined that it had no jurisdiction to consider the allegations in the bankruptcy proceedings. Consequently, the false charges against Plaintiff Ficaro terminated in Plaintiff Ficaro's favor.

231. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Emplolyee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and

JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

**COUNT VII**
**VIOLATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. §§1961–1968**
**(Against All Defendants)**

232. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

233. Starting in approximately July 2004, Defendants conducted and participated in an enterprise through an "association-in-fact" ("RICO Enterprise") whose legitimate objective was to help Defendant BETZOLD prevail in the arbitration.

234. The RICO Enterprise was also used by Defendant to pursue at least four separate racketeering schemes.

235. The first scheme pursued by the RICO Enterprise was extortion of a forced settlement of the arbitration dispute on terms unfavorable to Plaintiff FICARO's client, when Defendants threatened to defame Plaintiff FICARO, an attorney for one of the parties to that arbitration dispute, unless Plaintiff FICARO settled on terms favorable to Defendant BETZOLD and members of the RICO Enterprise.

*Appendix K*

236. The second scheme pursued by the RICO Enterprise was to perpetrate fraud on the United States Bankruptcy Court by preparing and filing a forged affidavit unrelated to the bankruptcy proceeding in an effort to have the Bankruptcy Court reverse the decision of the arbitrator against Defendant BETZOLD and in favor of Plaintiff FICARO's clients in that arbitration.

237. The third scheme pursued by the RICO Enterprise was to attempt to bribe MARROCCO so that MARROCCO would sign a statement affirming that the affidavit previously forged by at least one of the Defendants and filed in the bankruptcy proceeding accurately represented MARROCCO's statements.

238. As noted above, MARROCCO refused to participate in that scheme and promptly after being offered the bribe hired an attorney who communicated to members of the RICO Enterprise MARROCCO's refusal to accept their bribe.

239. The fourth scheme pursued by the RICO enterprise was to threaten to offer additional unspecified inflammatory evidence against Plaintiff FICARO at a further evidentiary hearing unless Plaintiff FICARO persuaded his clients to settle their arbitration dispute with Defendant BETZOLD on terms less favorable to Plaintiff FICARO's clients and more favorable to Defendant BETZOLD.

240. Defendants BETZOLD and LEVIN, on information and belief, created and were at all relevant

times, in control of the RICO Enterprise and managed the RICO Enterprise.

241. Defendants MISSNER and CHOSLOVSKY, under the direction and control of Defendants BETZOLD and LEVIN, aided in the operation and management of the RICO Enterprise, including operations that were designed to help the RICO Enterprise pursue legitimate objectives, as well as the fraudulent extortion scheme that was designed to unlawfully force a settlement of the arbitration dispute on terms unfavorable to Plaintiff FICARO's client.

242. In pursuing the illegitimate objectives of the RICO Enterprise, Defendants MISSNER and CHOSLOVSKY did not carry out their duties in accordance with generally accepted standards of the legal profession. To the contrary, Defendants MISSNER and CHOSLOVSKY violated their duties by perpetrating fraud on the bankruptcy court, as well as the parties in the arbitration and in the bankruptcy proceedings.

243. The common purpose of the RICO Enterprise was to extort a settlement of the underlying arbitration dispute on terms unfavorable to Plaintiff FICARO's client by threatening to defame Plaintiff FICARO, and by actually defaming Plaintiff FICARO.

244. The conduct referenced above violates the mail fraud and wire fraud statutes (18 U.S.C. §§ 1341 and 1343, respectively). The conduct reference above also

constitutes extortion. All of such conduct constitutes predicate acts for RICO purposes.

245. The common purpose of the RICO Enterprise was accomplished through the use of the U.S. Mail because, on information and belief, defamatory statements that were part of the RICO Enterprise's extortion scheme were communicated, among other ways, by U.S. mail.

246. The common purpose of the RICO Enterprise was also accomplished through the use of wire transmittals because, on information and belief, defamatory statements that were part of the RICO Enterprise's extortion scheme were communicated, among other ways, by means of wire transmittals through the use of both telephone and fax.

247. The conduct referenced above consisted of at least two predicate acts of racketeering, detailed herein, committed within a ten-year period. Those predicate acts had the same or similar purpose, results, participants, victims and methods of commission in that they involved Defendants, were all intended to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client, were all directed to Plaintiff FICARO, and all involved efforts to defame and discredit Plaintiff FICARO.

248. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, through the RICO

Enterprise, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), including treble damages, and an award of Plaintiffs' attorneys' fees and costs in amounts to be established at trial.

*Appendix K*

## COUNT VIII
## CIVIL CONSPIRACY
## (Against All Defendants)

249. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

250. As detailed above, at least two of the Defendants reached an agreement for the purpose of accomplishing a settlement of the underlying arbitration dispute on terms unfavorable to Plaintiff FICARO's client by extorting the settlement through defamatory publications and republications concerning Plaintiff FICARO.

251. As detailed above, at least one of the Defendants to the agreement referenced in the preceding paragraph committed at least one further act in furtherance of that agreement by forging the MARROCCO affidavit.

252. At least one of the Defendants to the agreement referenced in the preceding paragraph committed another act in furtherance of that agreement by threatening to defame Plaintiff FICARO in a phone call to Plaintiff FICARO's law partner, unless Plaintiff FICARO's client settled the arbitration dispute.

253. At least one of the Defendants to the agreement referenced in the preceding paragraph committed another act in furtherance of that agreement

by publishing the forged MARROCCO affidavit, thereby defaming Plaintiff FICARO.

254. At least one of the Defendants to the agreement referenced in the preceding paragraph committed another act in furtherance of that agreement by republishing the forged MARROCCO affidavit to persons not connected to any judicial or quasi-judicial proceedings, including the news media, thereby defaming Plaintiff FICARO.

255. The Defendants who did not specifically perform the acts referenced in the preceding four paragraphs promoted those acts through the means described herein.

256. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID MISSNER, Individually, and as an Agent and Employee

of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

**COUNT IX**
**TORTIOUS INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE**
**(Against All Defendants)**

257. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

258. At all times relevant, Plaintiff FICARO had a reasonable expectation of economic advantage with current and prospective clients. An attorney's ability to retain existing clients and solicit new clients is directly related to that attorney's good name, fame, and reputation by his or her clients, colleagues, acquaintances and the general public.

259. Defendants, at all times relevant, knEw of Plaintiff FICARO's relationship and reputation with his current and prospective clients and of Plaintiff FICARO's reasonable expectation that Plaintiff FICARO would profit therefrom.

260. Moreover, Defendants knew their actions and defamatory statements were likely to interfere with Plaintiff FICARO's economic relationships with existing and prospective clients, and deliberately published, as part of their fraudulent extortion scheme, false and disparaging statements in order to effectuate such interference.

261. Defendants' interference with Plaintiff FICARO's business relations was not privileged.

262. As a direct and proximate result of Defendants' wrongful interference, Plaintiff FICARO's relations with existing and prospective clients were damaged because of Plaintiff FICARO's loss of his reputation in his professional and personal communities. Plaintiff FICARO has lost earnings as a result of Defendants' wrongful interference.

263. Additionally, Defendants' willful conduct and the need to deter future misconduct by Defendants and others warrants an award of punitive damages in an additional amount to be determined at trial.

WHEREFORE, Plaintiff MICHAEL A. FICARO, Individually, demands judgment be entered against Defendants NICHOLAS BETZOLD, JR., Individually, LARRY LEVIN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, LTD., DAVID

MISSNER, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK L.L.P., WILLIAM CHOSLOVSKY, Individually, and as an Agent and Employee of DLA PIPER, RUDNICK, GRAY, CARY U.S., L.L.P. f/k/a PIPER RUDNICK, L.L.P., DLA PIPER, RUDNICK, GRAY, CARY U.S., LLP f/k/a PIPER RUDNICK, L.L.P., and others, JANE DOE and JOHN DOE, as of yet unidentified, and each of them, both jointly and severally, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), plus punitive damages in an amount to be established at trial.

**COUNT X**
**RESPONDENT IN DISCOVERY**
**INTENTIONAL DEFAMATION**

264. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

265. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

266. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral

communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be defamed, and maligned and damaged Plaintiff's professional and personal reputation.

267. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from intentionally and recklessly declaring false information about Plaintiff FICARO.

268. The aforesaid intentional and malicious acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

269. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

*Appendix K*

## COUNT XI
## RESPONDENT IN DISCOVERY
## NEGLIGENT DEFAMATION

270. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

271. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

272. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be defamed, and maligned and damaged Plaintiff's professional and personal reputation.

273. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from negligently declaring false information about Plaintiff FICARO.

274. The aforesaid negligent acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER,

CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

275. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

**COUNT XII**
**RESPONDENT IN DISCOVERY**
**INTENTIONAL FALSE LIGHT INVASION**
**OF PRIVACY**

276. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraph 1 to 198 of this Amended Complaint.

277. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral

communications, and the subsequent newspaper articles concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

278. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, caused Plaintiff to be placed in a false light before the public, were highly offensive to a reasonable person, and maligned and damaged Plaintiff's professional and personal reputation.

279. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from intentionally and recklessly declaring false information about Plaintiff FICARO, so as to place Plaintiff in a false light.

280. The aforesaid intentional and malicious acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

281. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN,

LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

**COUNT XIII**
**RESPONDENT IN DISCOVERY**
**NEGLIGENT FALSE LIGHT INVASION**
**OF PRIVACY**

282. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

283. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper articles, concerning Plaintiff FICARO, were, and are false, and constituted libel, slander and defamation *per se*.

284. The contents, statements, representations, disclosures and implications of the aforementioned Motion to Stay and purported affidavits, all related oral communications, and the subsequent newspaper

articles, concerning Plaintiff FICARO, caused Plaintiff to be placed in a false light before the public, were highly offensive to a reasonable person, and maligned and damaged Plaintiff's professional and personal reputation.

285. At all relevant times, Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, had a duty to refrain from negligently declaring false information about Plaintiff FICARO, so as to place Plaintiff in a false light.

286. The aforesaid negligent acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, embarrassment and loss of his reputation in his professional and personal communities.

287. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

*Appendix K*

## COUNT XIV
## RESPONDENT IN DISCOVERY
## ABUSE OF PROCESS

288. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

289. As shown above, Defendants had an ulterior purpose and motive in Defendant BETZOLD's Chapter 11 bankruptcy case. That ulterior purpose and motive was, as further detailed above, to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client by threatening to publish defamatory statements about Plaintiff FICARO.

290. Defendants BETZOLD, MISSNER and CHOSLOVSKY, as further detailed above, used the legal process in the Betzold Chapter 11 bankruptcy case to perpetrate their fraudulent extortion scheme, by filing in that case defamatory affidavits (including one that was forged by Defendants) that had nothing to do with that case and that were a nullity.

291. As explained in detail above, the filing of the affidavits was not proper in the regular prosecution of the Chapter 11 bankruptcy case. The bankruptcy case was used by Defendants BETZOLD, MISSNER and CHOSLOVSKY to perpetrate an extortion scheme to accomplish an objective (force a settlement on terms unfavorable to Plaintiff FICARO's client) which could not be accomplished through the bankruptcy case itself.

292. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

293. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

**COUNT XV**
**RESPONDENT IN DISCOVERY**
**MALICIOUS PROSECUTION**

294. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

295. Defendants BETZOLD, MISSNER and CHOSLOVSKY instituted and prosecuted judicial proceedings in the Betzold Chapter 11 bankruptcy case.

296. For the reasons discussed in detail above, there was no probable cause for instituting and prosecuting those proceedings, and no probable cause for instituting and prosecuting the defamatory charges against Plaintiff FICARO in those proceedings.

297. In instituting and prosecuting the judicial proceedings in the Betzold Chapter 11 bankruptcy case, including the defamatory charges against Plaintiff FICARO, Defendants intended to follow-through on their fraudulent scheme and threats to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client by defaming Plaintiff FICARO.

298. At all relevant times in connection with their acts against Plaintiff FICARO, Defendants acted with malice.

299. Defendants withdrew the affidavits, including the forged MARROCCO affidavit, from the bankruptcy proceeding. Additionally, the bankruptcy court determined that there was no probable cause for the initiation of the bankruptcy proceedings. Consequently, the false charges against Plaintiff FICARO terminated in Plaintiff FICARO's favor.

300. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

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301. Resondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VERGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

**COUNT XVI**
**RESPONDENT IN DISCOVERY**
**VIOLATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. §§1961-1968**

302. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 and 264 to 293 of this Amended Complaint.

303. Starting in approximately July 2004, Defendants conducted and participated in an enterprise through an "association-in-fact" ("RICO Enterprise") whose legitimate objective was to help Defendant BETZOLD prevail in the arbitration proceedings.

304. The RICO Enterprise was also used by Defendant to pursue at least four racketeering schemes.

305. The first scheme pursued by the RICO Enterprise was extortion of a forced settlement of the arbitration dispute when Defendants threatened to defame Plaintiff FICARO, an attorney for one of the parties to that arbitration dispute, unless Plaintiff FICARO settled on terms favorable to Defendant BETZOLD and members of the RICO Enterprise.

306. The second scheme pursued by the RICO Enterprise was to perpetrate fraud on the United States Bankruptcy Court by preparing and filing a forged affidavit unrelated to the bankruptcy proceeding in an effort to have the Bankruptcy Court reverse the decision of the arbitrator against Defendant BETZOLD and in favor of Plaintiff FICARO's client in that arbitration.

307. The third scheme pursued by the RICO Enterprise was to attempt to bribe MARROCCO so that MARROCCO would sign a statement affirming that the affidavit previously forged by at least one of the Defendants and filed in the bankruptcy proceeding accurately represented MARROCCO's statements.

308. As noted above, MARROCCO refused to participate in that scheme and promptly after being offered the bribe hired an attorney who communicated to members of the RICO Enterprise MARROCCO's refusal to accept their bribe.

309. The fourth scheme pursued by the RICO enterprise was to threaten to offer additional unspecified inflammatory evidence against Plaintiff FICARO at a further evidentiary hearing unless Plaintiff FICARO persuaded his clients to settle their arbitration dispute with Defendant BETZOLD on terms less favorable to Plaintiff FICARO's clients and more favorable to Defendant BETZOLD.

310. Defendant BETZOLD, on information and belief, created and was at all relevant times, in control of the RICO Enterprise and managed the RICO Enterprise.

311. Defendants MISSNER and CHOSLOVSKY, under the direction and control of Defendant BETZOLD, aided in the operation of the RICO Enterprise, including operations that were designed to help the RICO Enterprise pursue legitimate objectives, as well as the fraudulent extortion scheme that was designed to force a settlement of the arbitration dispute on terms unfavorable to Plaintiff FICARO's client.

312. In pursuing the illegitimate objectives of the RICO Enterprise detailed above, Defendants MISSNER and CHOSLOVSKY did not carry out their duties in accordance with generally accepted standards of the legal profession. To the contrary, Defendants MISSNER and CHOSLOVSKY violated their duties by perpetrating fraud on the bankruptcy court, as well as the parties in the arbitration and in the bankruptcy proceedings.

313. The common purpose of the RICO Enterprise was to extort a settlement of the underlying arbitration dispute on terms unfavorable to Plaintiff FICARO's client by threatening to defame Plaintiff FICARO, and by actually defaming Plaintiff FICARO.

314. The conduct referenced above violates the mail fraud and wire fraud statutes (18 U.S.C. §§1341 and 1343, respectively). The conduct referenced above also constitutes extortion. All of such conduct constitutes predicate acts for RICO purposes.

315. The common purpose of the RICO Enterprise was accomplished through the use of the U.S. mail because on information and belief, defamatory statements that were part of the RICO Enterprise's extortion scheme was communicated, among other ways, by U.S. mail.

316. The common purpose of the RICO Enterprise was also accomplished through the use of wire transmittals because on information and belief, defamatory statements that were part of the RICO Enterprise's extortion scheme were communicated, among other ways, by means of wire transmittals through the use of both telephone and fax.

317. The conduct referenced above consisted of at least two predicate acts of racketeering committed within a ten-year period. Those predicate acts had the same or similar purpose, results, participants, victims and methods of commission in the that they involved

Defendants, were all intended to extort a settlement of the underlying arbitration on terms unfavorable to Plaintiff FICARO's client, were all directed to Plaintiff FICARO, and all involved efforts to defame and discredit Plaintiff FICARO.

318. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, through the RICO Enterprise, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment and loss of his reputation in his professional and personal communities.

319. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

*Appendix K*

## COUNT XVII
## RESPONDENT IN DISCOVERY
## CIVIL CONSPIRACY

320. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198, 264 to 319 of this Amended Complaint.

321. As detailed above, at least two of the Defendants reached an agreement for the purpose of accomplishing a settlement of the underlying arbitration dispute on terms unfavorable to Plaintiff FICARO's client by extorting the settlement through defamatory publications and republications concerning Plaintiff FICARO.

322. As detailed above, at least one of the Defendants to the agreement referenced in the preceding paragraph committed at least one further act in furtherance of that agreement by forging the MARROCCO affidavit.

323. At least one of the Defendants to the agreement referenced in the preceding paragraph committed another act in furtherance of that agreement by threatening to defame Plaintiff FICARO in a phone call to Plaintiff FICARO's law partner, unless Plaintiff FICARO's client settled the arbitration dispute on terms unfavorable to Plaintiff FICARO's client.

324. At least one of the Defendants to the agreement referenced in the preceding paragraph

committed another act in furtherance of that agreement by publishing the forged MARROCCO affidavit, thereby defaming Plaintiff FICARO.

325. At least one of the Defendants to the agreement referenced in the preceding paragraph committed another act in furtherance of that agreement by republishing the forged MARROCCO affidavit to persons not connected to any judicial or quasi-judicial proceedings, including the news media, thereby defaming Plaintiff FICARO.

326. The Defendants who did not specifically take the acts referenced in the preceding four paragraphs promoted those acts through the means described herein.

327. The aforesaid acts of Defendants BETZOLD, LEVIN, FUNKHOUSER, MISSNER, CHOSLOVSKY, DLA and DOE, and each of them, proximately caused Plaintiff FICARO to suffer emotional distress, personal injury, embarrassment, and loss of his reputation in his professional and personal communities.

328. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VERGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO, designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VERGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

**COUNT XVIII**
**RESPONDENT IN DISCOVERY**
**TORTIOUS INTERFERENCE WITH A**
**PROSPECTIVE ECONOMIC ADVANTAGE**

329. Plaintiff FICARO hereby incorporates and realleges all of the foregoing allegations of paragraphs 1 to 198 of this Amended Complaint.

330. At all times relevant, Plaintiff FICARO had a reasonable expectation of economic advantage with current and prospective clients. An attorney's ability to retain existing clients and solicit new clients is directly related to that attorney's good name, fame, and reputation by his or her clients, colleagues, acquaintances and the general public.

331. Defendants, at all times relevant, knew of Plaintiff FICARO's relationship and reputation with his current and prospective clients and of Plaintiff FICARO's reasonable expectation that Plaintiff FICARO would profit therefrom.

332. Moreover, Defendants knew their actions and defamatory statements were likely to interfere with Plaintiff FICARO's economic relationships with existing

and prospective clients, and deliberately published, as part of their fraudulent extortion scheme, false and disparaging statements in order to effectuate such interference.

333. Defendants' interference with Plaintiff FICARO's business relations was not privileged.

334. As a direct and proximate result of Defendants' wrongful interference, Plaintiff FICARO's relations with existing and prospective clients were damaged because of Plaintiff FICARO's loss of his reputation in his professional and personal communities. Plaintiff FICARO has lost earnings as a result of Defendants' wrongful interference.

335. Additionally, Defendants' willful conduct and the need to deter future misconduct by Defendants and others warrants an award of punitive damages in an additional amount to be determined at trial.

336. Respondent in Discovery, VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER, VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, is believed to have information essential to the determination of who should be properly named as additional defendants in this action.

WHEREFORE, Plaintiff MICHAEL A. FICARO designates VANCE L. LIEBMAN, Individually, and as an Agent and Employee of FUNKHOUSER,

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VEGOSEN, LIEBMAN & DUNN, LTD. f/k/a LEVIN & FUNKHOUSER, as a Respondent in Discovery.

Respectfully submitted,
CLIFFORD LAW OFFICES

By: s/ Richard F. Burke, Jr.

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## APPENDIX L — SUPREME COURT RULE 315 PETITION FOR LEAVE TO APPEAL OF DEFENDANT-PETITIONER, ROBERT A. CLIFFORD DATED SEPTEMBER 29, 2009

**No. 109007**

**In the**
**SUPREME COURT OF ILLINOIS**

**DAVID N. MISSNER,**

***Plaintiff-Respondent,***

v.

**ROBERT A. CLIFFORD,**

***Defendant-Petitioner.***

On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, there pending as matter 1-08-0686, and there heard on Appeal from the Circuit Court of Cook County, Illinois, where it pended as matter No. 06 L 12632.
Honorable **Jennifer Duncan-Brice**, Judge Presiding.

**SUPREME COURT RULE 315 PETITION FOR LEAVE TO APPEAL OF DEFENDANT-PETITIONER, ROBERT A. CLIFFORD**

*Appendix L*

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**ORAL ARGUMENT REQUESTED**
**IF REVIEW GRANTED**

*Appendix L*

## SUPREME COURT RULE 315 PETITION FOR LEAVE TO APPEAL OF DEFENDANT-PETITIONER, ROBERT A. CLIFFORD

### I. PRAYER FOR LEAVE TO APPEAL

Defendant-Petitioner, Robert A. Clifford, petitions for leave to appeal from the judgment of the appellate court affirming in part, reversing in part, and remanding for further proceedings a defamation *per se* claim against him. Clifford prays that this Court grant leave to appeal and thereafter reverse in part the appellate court judgment and affirm the summary judgment entered in Clifford's favor entered by the Circuit Court.

### II. STATEMENT OF RELEVANT DATES

The appellate court issued an opinion on May 20, 2009. On June 10, 2009, Clifford timely filed a petition for rehearing. On August 4, 2009, the court denied rehearing but withdrew the original opinion. On August 12, 2009, the appellate court issued a modified opinion. App. 1-30. Subsequently, on August 25, 2009, the Court granted Petitioner an extension of time for the filing of this Petition until September 29, 2009.

### III. POINTS RELIED UPON IN ASKING FOR SUPREME COURT REVIEW

The appellate court's decision freezes the ability of Illinois lawyers to publicly discuss their clients' cases. This Court's intervention is required to reverse this

severe chilling effect on free speech and zealous advocacy, especially where, as here, the lawyer's conduct was entirely within ethical bounds. The trial court correctly entered summary judgment for Clifford, finding that the fair report privilege protected the Press Statement issued by his law office, which accurately reported on the allegations Clifford's client had made in a publicly filed Verified Amended Complaint. The appellate court reversed in part, holding that if Clifford participated in the filing of the Verified Amended Complaint, a self-conferral exception would preclude him from invoking the fair report privilege. The appellate court also rejected Clifford's alternative arguments for affirmance—that there was an innocent construction to the Press Statement and that it expressed non-actionable opinion.

Review and reversal of the decision below is essential to lift the economic gag order the appellate court has placed on Illinois attorneys, who can no longer make *any* comment to the media without fear of suffering an adverse verdict in a collateral defamation action. While the appellate court found, in the appeal from the underlying case (which is also before this Court as matter No. 109077), that the subject Complaint was valid at the time it was filed, it has ordered Clifford to stand trial simply because his office accurately reported the contents of that lawsuit. The rule of law announced by the appellate court leaves all Illinois lawyers in grave peril of suit if they exercise their well-established First Amendment right to speak about their clients' cases outside of the courtroom. The outlier nature of this decision especially warrants this Court's review.

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In this era of enormous media attention to public events, the issues raised by this appeal are timely, important, and of first impression in Illinois. The appellate court nowhere considered the context of the speech—a lawyer commenting to the public on his client's litigation—and the First Amendment protections that apply to that context. The appellate court failed to distinguish or even cite to *Owen v. Carr*, 113 Ill. 2d 273, 280 (1986), which held that an attorney's "biased presentation of his client's view of a pending cause of action" is non-actionable opinion.

Further, erroneously finding that the Illinois Supreme Court, in *Solaia Technology v. Specialty Publishing. Co.*, 221 Ill. 2d 558 (2006), had adopted comment c of *Restatement (Second) of Torts §611*, the appellate court then misinterpreted that comment believing it was bound by established law. App. at 16. Indeed, while a handful of state courts outside of Illinois have considered the "self-conferral exception" contained in comment c, none have applied it in this manner. These other courts have plainly read the exception to prevent a bad-actor from filing a bogus complaint for the sole purpose of shielding himself from a defamation claim when he publicizes the complaint. Not only is this case barren of any such facts, but the appellate court has found the allegations Clifford's client filed were not unreasonable at the time.

The appellate court decision raises other issues of first impression. Conflating the "publication" of defamatory material under the parlance of defamation

law with the "making" of a publication under the *Restatement's* exception, the appellate court erases the line between attorney and client in a novel and dangerous fashion. Review is further warranted to ensure that attorney-speech law in Illinois remains consistent with established ethical rules.

Finally, this appeal would allow the Court to squarely address whether *Restatement (Second) of Torts* §564A should be adopted in Illinois. The panel erroneously relied on the restatement in rejecting Clifford's innocent construction argument, holding that the press statement, while not mentioning Missner by name, referred to a group of people sufficiently small and who could reasonably be understood to apply to any member of the group, giving rise to a viable claim by each. App. at 22-26. This reading contradicts the innocent construction rule under which courts are instructed not to read words into an alleged defamation. In applying §564A, that is precisely what the panel did.

The legal issues involved transcend the individual facts of this case and will be important in numerous defamation cases where lawyers speak to the press, or even at Bar Association and CLE functions, on their clients' litigation. If the appellate court judgment is reversed and the Circuit Court affirmed, the case will be concluded. The Rule 315 criteria are amply satisfied. This case clearly warrants this Court's review.

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## IV. STATEMENT OF FACTS

### *Procedural History in the Circuit Court*

The case at bar really involves two proceedings, this defamation case (the Missner case) and the case about which the press statement was made (the Ficaro case). Because the Ficaro case is also before this Court, intimately connected with the issues here, and is subject to being judicially noticed by this Court [See: page 6, *infra*], brief references to the appellate court's opinion will be made in this Petition.

On December 6, 2005, Michael A. Ficaro, by his attorneys, Clifford Law Offices, filed a 67-page Verified Amended Complaint against Nicholas Betzold, Jr. and others, among them the Plaintiff in this case, David M. Missner. This pleading alleged, *inter alia*, that the Defendants had threatened to file false statements and affidavits to coerce Ficaro to resolve a lawsuit. C.036-103. The pleading was verified by Ficaro himself, and signed by Richard Burke, for the firm Clifford Law Offices. C.102. Clifford did not review the Amended Complaint before it was filed. C.378.

On December 4, 2006, David N. Missner and William Choslovsky filed a one-count complaint against Robert A. Clifford (C. 3-11) alleging defamation *per se* arising out of a Press Statement Clifford Law Offices issued, in Clifford's name, on or about December 8, 2005. Plaintiffs alleged the document "maliciously and wrongfully stated to the Chicago print media" that Plaintiffs had forged

the signature of an ex-FBI agent on a false affidavit in order to extort Ficaro to settle a contested legal case (C.007-08), that the statements were knowingly false or made without proper inquiry, and that Clifford thereby showed "actual malice, spite and ill-will toward the plaintiffs." C.008. The Complaint further alleged that all this was intentionally and maliciously done, intended to "destroy plaintiffs' good name and reputation." C. 008.

On February 20, 2007, Clifford filed a combined Motion to Dismiss and for Summary Judgment (C.020-131), supported by a Memorandum. C.132-52. Trial Judge Duncan-Brice issued a discovery order (C.156), but before discovery took place, Mr. Philip Nathanson moved to withdraw his appearance for one of the parties, William Choslovsky. C.157-59. Mr. Choslovsky secured new counsel, filed an Amended Complaint on his own behalf naming numerous other defendants (C.163-207), but thereafter was given leave to voluntarily dismiss his case. C.331.

Missner was given leave to file two separate responses to Clifford's motions. C.543. He filed his Response to the 2-619 Motion to Dismiss on October 1, 2007 (S.R.003-19), and his Response to the Motion for Summary Judgment on the same day. S.R.20-30. Thereafter, Clifford filed his Reply in Support (C.336-540), shortly after which the trial court granted Clifford summary judgment, finding that the December 6, 2005, statement "is privileged under the fair report doctrine." C.544-54; App. 31-41.

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On December 28, 2007, Missner file a Motion to Vacate and Reconsider the Motion for Summary Judgment (C.31-41), which was denied on February 22, 2008. C.562-66; App. at 42-46. Missner's Notice of Appeal on February 28, 2008. C.688-90.

***The Evidence in the Trial Court***

The trial court reviewed a great deal of evidence in connection with Clifford's dispositive motions. First, and most significantly, Missner has never disputed that the Press Statement was a fair and accurate account of the Amended Complaint and was issued after the complaint was filed. Next, Missner does not dispute that Clifford had nothing to do personally with the Press Statement, which was sent by a lawyer with Clifford Law Offices responsible for press contacts. Further, the record is absent of any evidence that Clifford or the law firm had any animus or actual malice toward Missner. Moreover, it is undisputed that Clifford Law Offices filed the litigation based upon information provided by Ficaro, an attorney, who had executed a verification of the Amended Complaint. There is no evidence that anyone at Clifford Law Offices had any reason to doubt the truth of the facts which he supplied and to which he swore an oath.

***The Ficaro Litigation***

The issues in this case arise from comments made on a pleading filed by Clifford Law Offices in the underlying case, *Ficaro v. Nicholas Betzold*, et al. After

the filing of these defamation proceedings, Clifford Law Offices, of course, withdrew from those proceedings. As this Court can take judicial notice of contents of its own files,[1] and since the Ficaro case is pending before it on Petition as matter 109077, the Court can notice that the trial court in that case specifically found, and the appellate court specifically affirmed, that Ficaro had reason to believe that the subject affidavit was a forgery up until the time of the author's deposition. *(See* Appendix to *Ficaro v. Betzold*, 109077 at 16-19, which noted that the complaint was filed upon a reasonable investigation which included a verified complaint and an investigation by Ficaro's law partner.)

***The Appellate Court's Opinion***

The appellate court reversed the summary judgment. After considering the procedural history and summarizing the arguments, the panel proceeded to what it considered the central issue, whether Clifford, as a matter of law, "was entitled to assert the fair report privilege and was not precluded from doing so by the self-conferral exception." App. at 13. It noted that the fair report protection applies equally to media and

1. This Court has held that "courts have taken judicial notice of other proceedings as where a holding in one cause, with substantially the same parties, is determinative of the pending cause." *Walsh v. Union Oil Co.*, 53 Ill. 2d 295, 299 (1972). Hence, the rule that courts may take judicial notice of the orders in other court files in their possession. *People v. Gindorf*, 159 Ill. App. 3d 647, 622 (1987); *People v. One 1999 Lexus*, 367 Ill. App. 3d 687, 690 (2006).

nonmedia reporters, according to *Restatement (Second) of Torts* §611, so long as the report is fair and accurate. App. at 14. It also noted, however, that "under the common law rule, '[a] person cannot confer [the fair report] privilege upon himself by making the original defamatory himself and then reporting to other people what he has stated' under the guise of privilege, even if the original publication itself was privileged." App. at 15, citing to *Restatement*, at §611, Comment c, at 299. The panel further held that, although this Court had not addressed this issue, it had adopted §611 in the case of *Solaia Technology v. Specialty Publishing Co.*, 221 Ill. 2d 558 (2006). The panel therefore felt itself bound to apply comment *c* in its entirety. App. at 16. The appellate court then went on to define the critical question under the Restatement as whether Clifford was an actual "publisher" of the defamatory statement, and that the evidence was "sufficient to pose a question of fact as to whether Clifford participated in the publication of the original defamatory statements.. . ." App. at 20.

## V. WHY SUPREME COURT REVIEW AND REVERSAL IS WARRANTED

### A. The Appellate Court Decision Unduly Restricts Lawyer Speech Beyond the Limits of the First Amendment and the Rules of Professional Conduct.

Illinois lawyers now face the chilling specter of civil damages for defamation if they make *any* comment to the press about their clients' litigation. The Court should exercise jurisdiction to reverse this dangerous

appellate court precedent, as it impinges on lawyers' First Amendment rights and conflicts with the strictures governing lawyer speech.

**1. In holding lawyers strictly liable for comments to the press, the appellate court's decision robs attorneys of their First Amendment protections.**

The United States Supreme Court has made clear that attorneys do not abandon their First Amendment rights when admitted to the Bar. To the contrary, the Supreme Court recognizes that attorneys often serve both the interests of their client and society at large when they publicly discuss their work. As the Court noted, at times "press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991). Moreover, the public benefits through more discussion of litigation, not, as the appellate court decision suggests in this decision, less. "Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion." *Id.* at 1057 (quoting *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975)).

The appellate court ignored all First Amendment considerations and instead essentially held lawyers strictly liable for all extrajudicial comments that they "publish." In stripping lawyers of privilege for discussing

their clients' cases in public—yet affording the privilege to journalists and all others who talk about the same lawsuit—Illinois lawyers now enjoy *fewer* First Amendment protections than all other citizens of the state. This Court should accept review as the appellate court exceeded the constraints enumerated by the Supreme Court.

### 2. Safeguards already exist within the judicial system that properly limit an attorney's extrajudicial comments regarding a pending case, without encroaching on the First Amendment.

While an attorney's right to speak is not entirely unfettered, the Constitution and Illinois law ensure that any limitations placed on extrajudicial commentary are extremely limited in scope, and that constraints are imposed only when essential to fairness in the courtroom. Because these constraints have been so well defined, free speech actually has been fostered—an attorney could comment on a pending litigation freely within the clearly proscribed limitations and without fear of punishment. Until now.

The appellate court decision reaches beyond the minimal limitations placed on attorney speech under clearly recognized Illinois law. For example, Illinois courts may only narrowly restrict counsel's speech through restraining orders under limited circumstances that do not trample counsel's First Amendment rights. "[A] trial court can restrain parties and their attorneys

from making extrajudicial comments about a pending civil trial only if the record contains sufficient specific findings by the trial court establishing that the parties' and their attorneys' conduct poses a *clear and present danger or serious and imminent threat to the fairness and imminent threat to the fairness and integrity of the trial.*" *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 244 (1986).

This same language, and narrow scope, is in accordance with the Supreme Court's decision in *Gentile* and Illinois Rule of Professional Conduct 3.6. While Illinois restricts attorneys from making extrajudicial statements that they know or reasonably should know could "pose a serious and imminent threat to the fairness of an adjudicative proceeding," so long as they remain within the boundaries of the ethical rule, attorneys are fully entitled to speak about a pending case outside the courtroom. For example, Rule 3.6 specifically allows an attorney to discuss, *inter alia*, "the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved" as well as "information contained in a public record." Ill. R. Prof. Conduct 3.6 (c). Any action by the court that hampers an attorney's discussion of these topics raises serious First Amendment concerns. *See Gentile*, 501 U.S. at 1054 ("At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."); *see also Atlanta-*

*Journal Constitution v. State*, 596 S.E.2d 694, 697 (Ga. Ct. App. 2004) (finding restrictive order overbroad where it forbade parties from discussing topics enumerated in Georgia rule identical to Illinois rule). Yet, the topics discussed in the Press Statement are well within the boundaries explicitly allowed under Rule 3.6.

The appellate court decision is indeed chilling, casting doubt upon long-held principles of what is permissible speech for attorneys. Even commentary such as the Press Statement that hews closely to the allegations in a complaint—a statement that could not be the subject of a gag order and that fully complies with Rule 3.6—may now subject an Illinois attorney to liability. Such a dangerous precedent should not be permitted to stand.

### 3. The Press Statement contains constitutionally protected opinion.

In construing the Press Statement as entirely factual, and not opinion, the appellate court gave no credence to context. As the Illinois Supreme Court consistently recognizes, the public understands that when an attorney speaks in public before a trial, he advocates an adversarial position that has yet to be proven true or false. Indeed, in *Owen v. Carr*, this Court held that an attorney's expression of opinion regarding his client's allegations against another party are constitutionally protected. *Id.*, 113 Ill. 2d at 280 (finding non-defamatory an article that "can reasonably be construed as an attorney's biased presentation of his

client's view of a pending cause of action"). This Court reiterated its view that "the public has a sophisticated understanding of the court system and is capable of evaluating information gleaned from a complaint." *Solaia Tech.*, 221 Ill. 2d at 589.

Moreover, the appellate court found that Clifford could not rely on this defense because the Illinois Supreme Court had not yet resolved the issue of whether such constitutional protections apply in a case involving private parties discussing a matter of public concern. Today, the issue should be resolved, and resolved in favor of the defendant. The Court in *Imperial Apparel* noted some of the benefits to applying the constitutional privilege to private litigants, even involving private matters:

> The approach also recognizes that the inherent worth of speech in terms of its capacity for informing the public is not dependent on the status of the defendant who publishes it. In addition, the approach reduces ambiguity regarding whether a particular communication is actionable. This is an important value in first amendment jurisprudence, for ambiguity yields fear of liability and fosters self-censorship, the effects of which chill the free flow of protected expression.

*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 400 (2008) (citations omitted).

Review in this Court, and reinstatement of the summary judgment for Clifford, therefore, is warranted.

**B. Court should not interpret comment c of §611 of the Restatement (Second) of Torts so as to effectively destroy the fair report privilege for Illinois lawyers.**

**1. Illinois has not adopted a "self-conferral exception" to §611.**

With no basis in existing Illinois law, the appellate court misapplied an obscure exception to §611 of the *Restatement (Second) of Torts* to strip Clifford of the fair report privilege that permits all other citizens to discuss the allegations of this litigation. After acknowledging that "our supreme court has not squarely addressed this threshold issue," the appellate court declared its hands tied by precedent because, in its view, the Court "has otherwise adopted section 611 of the Restatement (Second) of Torts, including comment *c*." (Order, at 16.) The appellate court's adoption of the entirety of comment c is especially puzzling when that court notes, in the very same paragraph, that this Court rejected another provision, comment e. (*Id.*)

Indeed, neither of the cases the appellate court relied on involved the adoption of any portion of comment c. *Catalano v. Pechous* does not so much as reference that comment. *Id.*, 83 Ill. 2d 146, 167-68 (1980). *Solaia Technology* refers to comment c merely to clarify the language in rejecting comment e. *Solaia Tech.*, 221

Ill. 2d at 589. As neither of the cases involved adoption of comment c, the appellate court's hands were hardly tied.

On the contrary, this Court in *Solaia Technology* underscored the "public's interest in the judicial system" by flatly declining to impose broad limitations on the fair report privilege. *Id.* It would be nonsensical to find that a reporter would be entitled to protection for reporting on the complaint, even if it knew that the allegations in the complaint were false, yet an attorney who believed the allegations were true would not be shielded from liability for making the same report. Because, as the Supreme Court recognized, an attorney is often in the best position to provide information about a pending case, denying an attorney the right to comment on a case under any circumstances would be contrary to the public interest. *See Gentile*, 501 U.S. at 1054.

Just such a nonsensical result has occurred here. Neither of the reporters who relied on the Statement, nor the plaintiff who made the allegations—the very same person who initiated the Statement—are exposed to any liability. Only the attorney who allowed his name to appear in the signature block is on the hook on the basis of a fairly straightforward summary of the allegations contained in the complaint.

**2. Courts outside of Illinois have determined that the exception in comment c only applies, if at all, under limited circumstances that do not apply here.**

Consideration of this appeal would make Illinois the first in the nation to determine whether a "self-conferral exception" should apply to an attorney. Our research uncovered no other state court outside of Illinois that has applied this exception to anyone, let alone an attorney. Of the few that have examined the issue, each has consistently found that the exception should only apply, if at all, under limited circumstances. *E.g.*, *Rosenberg v. Helinski*, 616 A.2d 866, 876-77 (Md. 1993) (citing cases).

The *Rosenberg* court questioned whether the self-conferral exception was intended to be part of the Restatement, noting that one participant at the American Law Institute called "the proposed comment 'a flat contradiction of black letter' law as set forth in §611." *Id.* at 876. The court found that denying "the privilege to a witness reporting his own testimony, while the privilege is available to any other court spectator later recounting that same testimony, would defy logic." *Id.* at 877.

Other courts have noted the inherent logical inconsistencies of the supposed exception. The Sixth Circuit, rejecting a similar exception under Michigan law, laid out the absurdity of the exception in a concurrence: "[S]uppose the plaintiff, or perhaps her

lawyer, is interviewed on a news program and responds with a fair and true summary of the complaint's allegations. Surely it makes no sense to interpret the statute so as to extend the privilege to the interviewer but not to the interviewee." *Amway Corp. v. Proctor & Gamble Co.*, 346 F.3d 180, 188 (6th Cir. 2003) (J. Schwarzer, concurring). A New Mexico appellate court found that the exception, if it existed, did not apply to the facts before it. *Stover v. Journal Pub. Co.*, 731 P.2d 1335, 1339-40 (N.M. Ct.App., 1987). That court noted the strange result of according an attorney absolute immunity for making defamatory remarks in a pleading and yet potentially conferring liability on the fair and accurate report of the same material. *Id.* at 1340.

Though none of these courts ultimately adopted comment e in its entirety, each recognized that its scope should be limited to cases in which a person brings a suit or holds a public meeting "not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience." *Stover*, 731 P.2d at 1339; *see also Green Acres Trust v. London*, 688 P.2d 617, 627 (Ariz. 1984) (Arizona Supreme Court holds, in *dicta*, "One exception to this wide application is the speaker who *by design* uses the privilege to republish defamation he previously made during the public proceeding.") (emphasis added); *Rosenberg*, 616 A.2d at 685 ("We think this to be the better interpretation of the *Restatement*; the privilege will be forfeited only if the defamer

illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place."). Such an interpretation comports with a plain reading of comment c.

The appellate court's blanket adoption and misinterpretation of comment c makes Illinois an outlier jurisdiction, leaving lawyers here more vulnerable to defamation litigation than elsewhere in the country, and making them less able to fully defend their clients outside of the courtroom. The appellate court essentially ruled that an attorney, or any person with a hand in the creation of a court pleading, regardless of the extent, is strictly liable for any extrajudicial reporting made in relation to that pleading. Under this outlier view, whether a report is fair or accurate is of no consequence. As the A.L.I. participant quoted in *Rosenberg* argued, this is a flat contradiction to the black letter law of §611.

The Court should review this issue of first impression in Illinois to ensure that Illinois does not become an outlier jurisdiction.

### 3. This Court should not adopt an unreasonable "self-conferral exception."

If this Court were to adopt the "self-conferral exception," the doctrine's scope must be limited to parties who purposefully and by design file a complaint solely for the purpose of repeating scurrilous accusations in the press or to the public at large. This is in line with the plain language of the exception, with

the findings in other jurisdictions, and even with the decision in *Kurczaba v. Pollock*, 318 Ill. App. 3d 606, 708 (1st Dist. 2003), which essentially held that an attorney could be liable for using an improperly filed complaint as a prop to shield himself from liability. *Id.* While the court in that case did apply the "self-conferral" exception, it offers no rationale for doing so, and under the facts of that case, the "complaint" was little more than a prop—the original complaint had been thrown out and the amended complaint was not properly filed and hence a legal nullity. *Id.* Moreover, unlike the case at bar, the defamatory material in that case was not a fair abridgement of the allegations ultimately filed in that case.

However, it would be better if even this "limited scope" view not be adopted. As this Court has interpreted the black letter law of section 611, even actual malice—knowingly reporting an false allegations made in court—does not trump the fair report privilege. *Solaia*, 221 Ill. 2d at 587. Consistent with that, self-conferral should not trump the privilege. The only justification for the self-conferral exception is to try to prevent collusive, pretextual public filings. But if malice does not trump the fair report privilege, neither should collusion.

Moreover, if pretextual public filings are the target of such an exception, established Illinois law already addresses this concern in a manner that does not interfere with an attorney's First Amendment rights. Rule 137, not a civil jury trial in which the lawyer-

defendant has been stripped of all privilege, offers the proper balance between the First Amendment and spuriously offensive pleadings. Rule 137 should be Missner's sole avenue of redress against Clifford in this matter. The appellate court in *Ficaro*, in affirming the denial of Missner's sanctions request, held that Clifford's client "presented an objectively reasonable argument for including [the allegedly defamatory] allegation, and therefore the fact that this allegation was later found to be untrue and that plaintiff's investigation was not exhaustive would not warrant sanctions." (*Ficaro* Order at 19.) As the underlying complaint did not violate Rule 137, and no one has alleged or found that the Press Statement constituted a threat to the fairness of the proceedings, the First Amendment does not permit the appellate court to choke off all public comment. The appellate court's opinion has created a scenario where a pleading verified by one person in good faith can be the basis of an action against another for an accurate report therefore made by an employee, also in good faith. This Court's review clearly is warranted.

**4. The appellate court should not have used the term "publication" as defined in defamation law to inform the term "making the original defamatory publication himself" in the *Restatement*.**

Having erroneously found that a self-conferral exception exists to the fair report privilege, the appellate court compounded its error by finding that an attorney should be held liable for allegations made in his or her

client's complaint. It found that the fact question was "whether defendant *participated in the publication* of the original defamatory statements . . ." App. at 20, emphasis added. Application of the self-conferral exception to the fair report privilege is not based on mere participation in the original publication. Instead, according to comment c, the targeted defendant must have actually "made" the original defamatory publication. Comment c states in part: "A person cannot confer this privilege upon himself by *making* the original defamatory publication himself and then reporting to other people what he had stated . . ." Restatement (Second) of Torts, §611, comment c (emphasis added). The comment does not state that it is enough to "participate" in the making of the original publication. The client makes the allegations, not the attorney, especially when the allegations are verified.

A plain reading of comment c would not hold an attorney accountable for "making" a publication, particularly an attorney who, as with Clifford here, did not actually write or file the complaint himself. "*A* person cannot confer this privilege upon *himself* by making the original defamatory publication *himself* and then reporting to other people what *he* had stated." *Id.* The comment is drafted in the singular ("himself," "he") so as to require the very same individual to make the first publication and then make the report to others.

The appellate court opinion errs by remanding for a factual determination of whether defendant participated in the publication of the original defamatory

statements. Instead, if a self-conferral exception is recognized, the factual issue should be whether the original publication was made with the plaintiff's specific intent to implement a scheme to establish a privilege in order to thereafter publicize the content to others. The attorney for the client should not be responsible for the client's allegations.

In conflating these issues, and holding that Clifford's role in filing *Ficaro v. Missner* complaint rendered him a "mak[er] of the defamatory publication himself[,]" the appellate court has blurred the lines between party and advocate, as sharply drawn in other contexts. The appellate court's apparent confusion severely chilled lawyers from performing their duty to zealously represent clients outside of the courtroom. This case must be reviewed to forestall such a result.

5. **The Press Statement can be innocently construed because it does not identify Missner.**

The appellate court's refusal to find that the innocent construction rule precluded Missner's claim is also contrary to established Illinois law, as this Court reinforced as recently as last week. Here, the face of the press statement did not name Missner at all, Even if, as the appellate court found, the Verified Amended Complaint should be read in concert with the statement—in spite of the absolute privilege attached to that pleading—the innocent construction rule should bar Missner's defamation claim. The allegedly

defamatory statements do not in any way describe him as an individual. Instead, the Verified Amended Complaint describes the actions of an unnamed attorney. It is impossible to determine whether Missner or one of the other attorneys named in the complaint performed the actions described.

As this Court reiterated in *Green v. Rogers*, under the innocent construction rule a libel plaintiff cannot succeed by pointing to one defamatory interpretation among many actionable and non-actionable constructions of a statement. *Id.*, No. 107129, slip op. at 17-19 (Ill. Sep. 24, 2009) Indeed, under well-established Illinois law, "if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*." *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982).

The appellate court ignored this precedent and relying on a section of the Restatement that has never been adopted in Illinois, selected one interpretation which allegedly defamed Missner from among many possible constructions. Based upon our own review of the case law, there is not a single citation to *Restatement (Second) of Torts* §564A in any previous Illinois precedent. This is undoubtedly because this section directly contradicts Illinois common law. The appellate court's reliance on §564A and its failure to follow Illinois law therefore also warrants review.

*Appendix L*

## VI. CONCLUSION

This case presents an issue of first impression that has far-reaching implications for members of the bar and for members of the public who participate in the judicial system. The appellate court decision will have a chilling effect on all extrajudicial commentary by attorneys because it effectively strips them of the right to fairly report on a judicial proceeding. The decision goes beyond the extremely limited circumstances under which Illinois courts and the United States Supreme Court have permitted constraints on attorney speech.

This Court should make clear that Illinois does not recognize the "self-conferral exception" to the fair report privilege. This Court also should make clear, as it did in *Owen v. Carr*, that context must be considered in the affording protection under the First Amendment to an attorney's comments about a client's litigation. Finally, this Court should hold that the appellate court erred in ruling that the Press Statement was incapable of an innocent construction.

For these reasons and the others set forth hereinabove, Robert A. Clifford asks this Court to grant him leave to appeal from the judgment of the Appellate Court, and upon review to reverse in part the appellate court judgment and affirm the summary judgment entered by the Circuit Court.

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Respectfully submitted,

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